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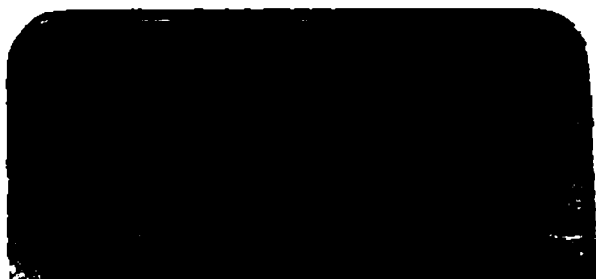
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PRINCIPLES
OF
THE CRIMINAL LAW.

PRINCIPLES
OF 162
THE CRIMINAL LAW.

A CONCISE EXPOSITION OF THE NATURE OF CRIME,
THE VARIOUS OFFENCES PUNISHABLE BY THE ENGLISH LAW,
THE LAW OF CRIMINAL PROCEDURE,
AND THE LAW OF SUMMARY CONVICTIONS.

WITH
TABLE OF OFFENCES, THEIR PUNISHMENTS AND STATUTES:
TABLES OF CASES, STATUTES, &c.

BY
SEYMOUR F. HARRIS, B.C.L., M.A. (OXON.)
AUTHOR OF "A CONCISE DIGEST OF THE INSTITUTES OF GAIUS AND JUSTINIAN."

EIGHTH EDITION.

BY
CHARLES L. ATTENBOROUGH,
OF THE INNER TEMPLE, AND OF THE MIDLAND CIRCUIT, BARRISTER-AT-LAW.

LONDON:
STEVENS & HAYNES,
Law Publishers,
BELL YARD, TEMPLE BAR.
1899.

PREFACE TO THE EIGHTH EDITION.

THE only Statute of great importance in the department of Criminal Law which has been enacted since the publication of the last edition of this work is the Criminal Evidence Act, 1898.

Concerning the results of that Statute there were many prophecies for good and for evil. It is, of course, premature to pronounce definitely as to its ultimate success or failure, but it is perhaps not going too far to say that during the short time which has elapsed since the Act came into operation no cases of injustice caused by it have been made public, while, on the other hand, the Act has worked as smoothly, and apparently as beneficially, as its most sanguine supporters could have expected. The passing of this Act has rendered necessary the re-writing of much of the chapter on Witnesses, and many alterations throughout the work.

In the same Session were passed two other Acts, each of which may be said to indicate a new departure—the Vagrancy Act, 1898, which enabled men who lived by peculiarly disgraceful means to be dealt with as rogues and vagabonds, and the Inebriates Act, 1898, which will empower the court to commit a criminal habitual drunkard to an inebriate reformatory established or certified by the State. The former Act has already done something to remedy the evil which it was intended to meet. The latter is not yet in force; the probability of its success in

reforming the criminal habitual drunkard may perhaps be doubted, but if the powers given by it are extensively used they may at least prevent persons of that class, during the period of their detention, from being a nuisance to the public.

C. L. A.

2 GARDEN COURT, TEMPLE,
1st December 1898.

PREFACE TO THE FIRST EDITION.

THE appearance of a new work on the Criminal Law may demand a few words of explanation. Many treatises dealing with this subject are already in existence. Why another? A mere enumeration of the modern standard authors will disclose the want of a manual which neither confines itself to the historical and philosophical view of the matter, nor descends into the minute particulars of the practice of the law. To mention those that are best known: Russell on Crimes is contained in three bulky volumes, and has little concern with criminal procedure. Archbold's and Roscoe's Criminal Practice, entering into every detail, are designed for the reference of the practitioner, when points actually present themselves. The modern commentaries founded on those of Blackstone stray into historical disquisitions which are apt to envelop the existing law in obscurity; and besides, the Criminal Law is contained in one of four volumes. Sir James Fitzjames Stephen's "General View of Criminal Law" does not profess to be an exposition of the offences and criminal procedure of our country; it has quite another object.

It seems, then, that there is scope for a comparatively small treatise concerning itself with the nature of crimes, the various offences punished by the law, and the proceedings which are instituted to secure that punishment. Such a work is calculated to meet the requirements of the young practitioner, who, in the first instance, wants a general introduction to the subject. It is also designed for the use of students, especially those preparing for the final examination of the Incorporated Law Society. To such, as well as

to the general reader, it is hoped that the present undertaking will commend itself.

We have referred above to certain well-known works on Criminal Law. These, the reports, the older text-books, and other authorities have been made to contribute information as the occasion required. Special acknowledgment is due, and is hereby rendered, to the "General View" of Sir James Fitzjames Stephen, from which frequent quotations have been made and matter borrowed,* to an extent sufficient to lead to further perusal of that work.

It is hoped that, while nothing useless and obsolete has been retained, there has not been any omission which will prevent the reader from obtaining a fair general view of the existing Criminal Law.

S. F. H.

LIVERPOOL, *Spring Assizes*, 1877.

An explanation must be given of the manner in which the punishments affixed to the various crimes are set forth in the body of the work. It was thought that much repetition might be avoided if attention were drawn to a few general rules. Only the maximum limit of penal servitude is noticed in the text, as, with very few exceptions which are specially pointed out, the minimum limit is five† years. Where penal servitude may be awarded, almost without exception (any exception being mentioned) the Court has the alternative of sentencing to imprisonment for a term not exceeding two years; therefore, such imprisonment has not generally been specified. The rules as to hard labour, whipping, and solitary confinement are adverted to in the chapter on Punishment. A reference to the Table of Offences at the end of the volume will clear up any difficulty which may arise.

* Many of these quotations have been omitted in the present (8th) Edition, as they do not appear in the 2nd Edition of the work referred to.—ED.

† Now three.—ED.

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ABBREVIATIONS

NOTICING

EDITIONS OF TEXT-BOOKS AND PERIODS COMPRISED IN REPORTS.

Addison . . .	Addison on Torts, 1893.
A. & E. . . .	Adolphus and Ellis's Reports, K. B., 1834-1841.
Arch.	Archbold's Pleading and Evidence in Criminal Cases, 1893.
Austin	Lectures on Jurisprudence, 1885.
Bac. Abr. . . .	Bacon's Abridgment.
Barn. K. B. . .	Barnardiston's Reps., K. B., 1724-1734.
B. & Ald. . . .	Barnewall and Alderson's Reps., K. B., 1818-1822.
B. & C.	Barnewall and Cresswell's Reps., K. B., 1823-1830.
Best, Ev. . . .	Best on Evidence, 1893.
B. & S.	Best and Smith's Reps., Q. B., 1861-1870.
Bing.	Bingham's Reps., C. P., 1822-1834.
Bing. N. C. . .	„ „ New Cases, C. P., 1834-1840.
Bl.	Blackstone's Commentaries. Edit. 1844.
Bl. W.	Blackstone's (William) Reps., K. B., 1746-1749.
Broom, C. L. . .	Broom's Common Law, 1896.
Bull. N. P. . .	Buller's Nisi Prius.
Burn	Burn's Justice of the Peace, 1869.
Burr.	Burrow's Reps., K. B., 1756-1772.
Camp.	Campbell's Reps., Nisi Prius, 1807-1816.
C. & K.	Carrington and Kirwin's Reps., N. P., 1843-1852.
C. & M.	Carrington and Marsham's Reps., N. P., 1842.
C. & P.	Carrington and Payne's Reps., N. P., 1823-1841.
Chitty, Cr. L. .	Chitty's Criminal Law.

Cl. & Fin.	.	.	Clark and Finnely's Reps., H. of Lords, 1831-1846.
C. B.	.	.	Common Bench Reps., 1845-1857.
C. B. (N.S.)	.	.	" " " New Series, 1857- 1865.
Corner's Cr. Practice			Corner's Crown Practice.
Cox	.	.	Cox's Criminal Cases, from 1843.
C. M. & R.	.	.	Crompton, Meeson, and Roscoe's Reps., Exch., 1834-1836.
Dalton	.	.	Dalton's Justice of the Peace.
Den.	.	.	Denison's Crown Cases, 1844.
Doug.	.	.	Douglas Reps., K. B., 1778-1785.
D. & B.	.	.	Dearsly and Bell's Crown Cases.
D. & M.	.	.	Davison and Merivale's Reps., 1843-1844.
D. & R.	.	.	Dowling and Ryland's Reps., K. B., 1822- 1828.
Dowl. P. C.	.	.	Dowling's Practice Cases, K. B., 1830-1841.
East	.	.	East's Reps., K. B., 1801-1814.
East, P. C.	.	.	East's Pleas of the Crown.
E. B. & E.	.	.	Ellis, Blackburn and Ellis' Reps., Q. B., 1858.
Ell. & Bl.	.	.	Ellis and Blackburn's Reps., Q. B., 1851- 1858.
Esp.	.	.	Espinasse's Reps., N. P., 1793-1807.
Exch.	.	.	Exchequer Reps., 1847-1857.
Fitz. St.	.	.	Stephen's General View of the Criminal Law, 1890.
Fost.	.	.	Foster's Reps., Crown Law, 1742-1761.
F. & F.	.	.	Foster and Finlason's Reps., N. P., 1858- 1865.
Hale, P. C.	.	.	Hale's History of the Pleas of the Crown.
Hal. Sum.	.	.	Hale's Summary.
Hans.	.	.	Hansard's Parliamentary Reports.
Hawk.	.	.	Hawkin's Pleas of the Crown.
H. Bl.	.	.	Henry Blackstone's Reports.
How. St. Tr.	.	.	Howell's State Trials.
H. & C.	.	.	Hurlstone and Coltman's Reps., Exch., 1862-1867.
H. & N.	.	.	Hurlstone and Norman's Reps., 1856-1862.
Inst.	.	.	Coke's Institutes.
Ir. R. Com. Law	.	.	Irish Reps., Common Law.
J. P.	.	.	Justice of the Peace Reports.

Jur.	.	.	Jurist Reps., 1837-1854.
Jur. (N.S.)	.	.	„ „ New Series, 1855-1865.
Kel.	.	.	Sir John Kelyng's Reps., K. B., 1673-1706.
L. J.	.	.	Law Journal Reps. in all the Courts, from 1831—(thus, L. J. (Q. B.), Queen's Bench Reps.; L. J. (M. C.), Magistrates' Cases).
L. R.	.	.	Law Reps. in all the Courts, from 1865.
L. R. Ir.	.	.	Law Reps., Ireland.
L. T. (N.S.)	.	.	Law Times Reps., New Series, from 1859.
Leach	.	.	Leach's Crown Cases, 1730-1788.
L. & C.	.	.	Leigh and Cave's Crown Cases, 1861-1865.
Lew. C. C.	.	.	Lewin's Crown Cases, 1822-1833.
Lord Raym.	.	.	Lord Raymond's Reps., K. B., 1694-1734.
M. & S.	.	.	Maule and Selwyn's Reps., K. B., 1813-1817.
May	.	.	May's Parliamentary Practice, 1893.
Mood. C. C.	.	.	Moody's Crown Cases, 1824-1844.
Moo. & M.	.	.	Moody and Malkin's Reps., N. P., 1826-1830.
M. & R.	.	.	Moody and Robinson's Reps., N. P., 1830-1844.
Oke, Mag. Form	.	.	Oke's Magisterial Formulist, 1893.
Oke, Mag. Syn.	.	.	„ „ Synopsis, 1893.
Paley, Sum. Con.	.	.	Paley's Summary Convictions, 1892.
Peake	.	.	Peake's Reps., N. P., 1790-1812.
Q. B.	.	.	Queen's Bench Reps. (Adolphus and Ellis), 1841-1852.
Rosc.	.	.	Roscoe's Evidence in Criminal Cases, 1890.
Russ.	.	.	Russell on Crimes, 1896.
R. & R.	.	.	Russell and Ryan's Criminal Cases, 1799-1824.
Ry. & M.	.	.	Ryan and Moody's Reps., N. P., 1823-1826.
Sm. L. C.	.	.	Smith's Leading Cases, 1896.
Stark. N. P. C.	.	.	Starkie's Reps., N. P., 1815-1823.
St. Bl.	.	.	Stephen's Commentaries, 1895.
St. Di.	.	.	Stephen's Digest of the Criminal Law, 1894.
Str.	.	.	Strange's Reps., K. B., 1716-1747.
Tayl. Ev.	.	.	Taylor on Evidence, 1895.

T. R.	.	.	Term Reps. (Durnford and East), 1785–1800.
T. Raym.	.	.	Sir Thomas Raymond's Reps., K. B., 1660–1684.
W. R.	.	.	Weekly Reporter.
Warb. L. C.	.	.	Warburton's Leading Cases in Criminal Law, 2nd Ed., 1897.
Willes	.	.	Willes' Reps., C. P., 1734–1758.

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PRINCIPLES OF THE CRIMINAL LAW.

BOOK I.

INTRODUCTORY CHAPTER.

CRIME.

THE term "*crime*" admits of description rather than Crime. definition. There are no certain and universal intrinsic qualities which at once stamp an act with the character of a crime. We term a flagitious act a crime rather on account of its consequences than from any regard to such intrinsic characteristics. Thus, turning to one of the most satisfactory explanations of the term under consideration, we learn that it is "an act forbidden by law under pain of punishment" (*a*).

The question at once presents itself, What are the Punishments. distinguishing marks of "punishments"? This will, perhaps, be seen most clearly by a contrast. Sanctions (that is, evils incurred by a person in consequence of disobedience to a command, and thus enforcing that command) fall under two heads.

1. Those which consist in the wrongdoer being obliged to indemnify the injured party, either in the way of damages or of specific performance.

(*a*) Fitz. St. 1.

2. Some suffering experienced by the wrongdoer.

In the first case the enforcement of the sanction is in the discretion of the injured party (or his representative), and its object is his advantage.

In the second case the sanction is imposed for the public benefit, and is enforced or remitted at the discretion of the sovereign as the representative of the public, such discretion being exercised according to law (*a*).

Crime and
Civil Injuries
contrasted.

Here we arrive at the true ground of distinction (or rather difference, inasmuch as the two terms do not exclude each other, and therefore cannot be distinguished) between Civil Injuries or Torts, and Crimes. The difference is not a difference between the tendencies of the two classes of wrongs, but a difference between the modes in which they are respectively pursued; that is, whether as in the first or second of the cases mentioned above (*b*).

That there is nothing in the nature of a crime which, *per se*, determines that a particular wrongful act should be necessarily relegated to the category of crime, two considerations will suffice to show. First, in different countries, and at different eras in the history of the same country, the line between *civil* and *criminal* is, and has been, utterly different. For example, at Rome theft was regarded as a civil injury, for which pecuniary redress had to be made. And we have only to point back to the Anglo-Saxon system to illustrate the narrowness of the domain of criminal law in rude societies. The second consideration is that the same wrongful act is regarded as a crime or a civil injury according as proceedings are taken with reference to the one or the other sanction. In the English law the best examples of this are libels and assaults. The same writing, or the same

(*a*) Austin, 518.

(*b*) Austin, 417. A good description of crimes having in view the true ground of difference is given in Bishop, 1 Cr. L. § 43. "Those wrongs which the government *notices* as injurious to the public, and punishes in what is called a criminal proceeding, in its own name."

assault, may be made the subject of civil or of criminal proceedings. If A. write of B. that he is a swindler, B. may either indict A. for the crime, or bring an action against him for the civil injury (*a*).

It may be well to interpose an explanation of the courses open to the injured person when the same wrong is both a crime and a civil injury. He has not always the power of choosing in which way he will proceed. The rule is based on the distinction of crimes into felonies and misdemeanors (*b*). It used to be considered that in the case of felonies the crime must be prosecuted before civil redress could be sought from the wrongdoer (*c*). In misdemeanors there is no such distinction; either proceeding may be taken first, or both may be pursued concurrently.

The same act the subject of both civil and criminal proceedings.

Before leaving the subject of the difference between crimes and civil injuries, two other groundless distinctions may be adverted to. First, the distinction does *not* consist in this, that the mischief of crimes (as a class) is more extensive than that of civil injuries (as a class); nor, secondly, in this, that the object of the sanction in the case of crimes is prevention, in the case of civil injuries redress to the injured party (*d*).

How nearly the two classes are related, even when the act cannot be regarded as common to both, an example will serve to show. A. falsely, fraudulently, and with intent to deceive B., sells him a quantity of beer short of the just measure. This was held to be only an inconvenience and injury to a private person, which might have been guarded against with due caution (*e*). But if the

(*a*) Austin, 417, 518.

(*b*) v. p. 7.

(*c*) The omission to prosecute would not now be considered a good plea in bar of the action. But if the felony appeared on the face of the plaintiff's pleadings the Court would probably order the action to be stayed. v. Addison on Torts, 76; *Wells v. Abrahams*, L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; 26 L. T. 433; Warb. L. C. 276; *Appleby v. Franklin*, L. R. 17 Q. B. D. 93; *Rooke v. D'Avigdor*, L. R. 10 Q. B. D. 412.

(*d*) Austin, 417, 520.

(*e*) *R. v. Wheatly*, 2 Burr. 1125; v. also *R. v. Codrington*, 1 C. & P. 661.

defect in the amount had been owing to a false vessel for measuring, A. would have been indictable. So was S., who delivered a quantity of coals, to his knowledge weighing 14 cwt., he falsely and fraudulently representing that the quantity he had delivered weighed 18 cwt., and thereby obtaining the price of 18 cwt. (a).

Proceedings,
civil or
criminal?

It is often of the utmost importance to determine whether a particular proceeding is a criminal or a civil proceeding. Thus, the right of appeal which generally exists in civil causes is, where there is any right of appeal at all, of an entirely different nature and form in criminal proceedings. The question arose on an information for the recovery of penalties for smuggling, under a particular statute (b). The true test is whether or not the infliction of punishment follows on the result being unfavourable to the defendant. If the end of the proceeding is that the defendant is required to pay a sum of money, the question will resolve itself into whether the fine is a debt or a punishment (c).

Morality and
crime.

The moral nature of an act is an element of no value in determining whether it is criminal or not. On the one hand, an act may be grossly immoral, and yet it may not bring its agent within the pale of the criminal law—as in the case of adultery. “Human laws are made, not to punish sin, but to prevent crime and mischief” (d). On the other hand, an act perfectly innocent, from a moral point of view, may render the doer amenable to punishment as a criminal. To take an extreme example: W. was convicted on an indictment for a common nuisance, for erecting an embankment which, although it was in some degree a hindrance to navigation, was advantageous in a greater degree to the users of the port (e). Here the motive, if not praiseworthy, was at least inno-

(a) *R. v. Sherwood*, 26 L. J. (M.C.) 81, overruling *R. v. Reed*, 7 C. & P. 848.

(b) *Attorney-General v. Radloff*, 10 Exch. 84.

(c) *Cattell v. Ireson*, 27 L. J. (M.C.) 167.

(d) *Attorney-General v. Sillem*, 2 H. & C. 526.

(e) *R. v. Ward*, 5 L. J. (K.B.) 221.

cent. The fact that the motive of the defendant is positively pious and laudable does not prevent a conviction if his act is in itself unlawful (a).

This forces upon our notice a division of crimes into *mala in se* and *mala quia prohibita*; a distinction which is of little practical importance in our English system, and which must necessarily vary with the standard of good and bad (b). There will always be some crimes which naturally take their place in the one class or the other; for example, no one will hesitate to say that murder is *malum in se*, or that the secret importation of articles liable to custom is merely *malum quia prohibitum*; but between these offences there are many acts which it is difficult to assign to their proper class.

Mala in se
and *Mala quia*
prohibita.

Some acts have been recognised as crimes in the English law from time immemorial, though their punishments and incidents may have been affected by legislation. Thus murder and rape are crimes at *common law*. In other cases, acts have been pronounced crimes by particular *statutes*, which have also provided for their punishment—*e.g.*, offences against the Bankruptcy Laws.

Crimes at
common law
and by statute.

In treating of the Criminal Law, or the Pleas of the Crown (c), the subject naturally divides itself into two portions. The first, dealing with crimes generally and the various individual crimes, their constituents, their differences, appropriate punishments, and other incidents, may be termed—*The Law of Crimes*. The second, dealing with the machinery by means of which these crimes are prevented, or, if committed, by means of which they meet with their punishment, may be termed—*The Law of Criminal Procedure*.

Division of the
subject.

(a) *R. v. Sharpe*, 26 L. J. (M.C.) 47.

(b) Austin, 590.

(c) So called because the king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is, therefore, in all cases the proper prosecutor for every public offence. 4 Bl. 2.

CHAPTER II.

DIVISIONS OF CRIME.

Explanation of
leading terms
in Criminal
Law.

Crime.—Offence.—These terms are sometimes used synonymously of the whole class of illegal acts which entail punishment. Each of them, however, has sometimes a narrower signification; and in this sense they are opposed to each other, and divide between them the whole field of acts which each in its wider sense covers. The latter use is that which confines the term “offence” to acts which are not indictable, but which are punished on summary conviction, or by the forfeiture of a penalty (*a*); while “crime” is restricted to those which are the subjects of indictment.

Indictable Crimes.—All treasons, felonies, and misdemeanors, misprisions of treason and felony (*b*), whether existing at common law or created by statute, are the subjects of indictment. So also are all attempts to commit any of these acts (*c*). Further, if a statute prohibits a matter of public grievance, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanours at common law, are punishable by indictment, if the statute does not manifestly seem to exclude this mode of proceeding (*d*). But it is otherwise if the rights which are regulated are merely private. If the statute on which the indictment is framed is repealed the statute cannot be acted upon, in respect of a pro-

(*a*) v. *Lee v. Dangar, Grant & Co.*, L. R. [1892], 2 Q. B. at pp. 347, 348. (b) v. p. 7. (c) v. p. 15.
(*d*) Hawk. Bk. 2, c. 25, s. 4.

ceeding under it, commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance (*a*). “It has long been established, that when an Act of Parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed” (*b*).

Misprision.—In general this term signifies some neglect or contempt, especially when a person, without assenting thereto, knows of any treason or felony and conceals it (*c*). But it has also been applied to every great misdemeanor which has no certain name given to it in the law; for example, the maladministration of public officers. The former kind is sometimes termed *negative*, the latter *positive* misprision.

The main classification of indictable crimes is threefold—Treason, Felony, Misdemeanor—though “treason” is strictly included in the term “felony.”

Felony.—*Misdemeanor*.—It will be remembered that in contrasting crimes and civil injuries, we found that there were no intrinsic qualities the possession of which assigned an act to either class. In distinguishing felony from misdemeanor we shall also find that the difference is only one founded on the consequences of each. But the latter classification is exhaustive, and not a cross division, as in the case of crimes and civil injuries, inasmuch as the same act cannot be both a felony and a misdemeanor.

It is a popular idea, which to a certain extent the law has countenanced, that the present distinction between felonies and misdemeanors is one founded on the degree of enormity of the crime. That this is not necessarily the case will be seen when we consider what offences belong to the one class and what to the other. No one will maintain that perjury, which is a misdemeanor, is of

(*a*) *R. v. Denton*, 18 Q. B. 761; 21 L. J. (M.C.) 207; 17 Jur. 453, following *R. v. Inhabitants of Mawgan*, 8 A. & E. 496; 7 L. J. (M.C.) 98.

(*b*) Per Lord Tenterden in *Surtees v. Ellison*, 9 B. & C. 750; 7 L. J. (K.B.) 335.

(*c*) v. p. 44.

less gravity than simple larceny, which is a felony. As a rule, however, the more serious crimes are felonies.

Origin of
"felony."

What, then, is the origin and force of this distinction, a distinction attended with important consequences? To obtain an answer we must look back to the period of feudal law. According to the better opinion the term "*felony*" is derived from two Teutonic words (*a*), the one signifying a fief or feud, the other price or value. Thus the term was applied to those offences which resulted in the tenant's forfeiture of his land to the lord of the fee; though primarily it signified the penal consequences—*i.e.*, the forfeiture of property in consequence of such offences. By another slight deflection the term was extended to offences which involved forfeiture of *goods*. Blackstone thus defines a felony to be "an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment *may* be superadded according to the degree of guilt" (*b*). Capital punishment, indeed, usually followed upon a conviction for felony, the exceptions being petty larceny and mayhem.

It may be noticed that where a statute declares that an offender against its provisions shall be deemed to have *feloniously* committed the act, the offence is thereby made a felony (*c*).

"*Misdemeanor*" is to be regarded as a negative expression; being applied to indictable crimes not falling within the class of felonies. In a wide and general sense, the term is also used synonymously with "crime."

Abolition of
forfeiture.

In the year 1870 the legislature struck at the root of the distinction we have been treating of; but the terms "felony" and "misdemeanor," having become firmly attached to the various indictable offences, still remain. It was provided that no confession, verdict, inquest, conviction or judgment of or for any treason, or felony, or

(a) Fee-lon. For some conjectural derivations, v. 4 St. Bl. 7.

(b) 4 Bl. 95.

(c) *R. v. Johnson*, 3 M. & S. 556.

felo de se, shall cause any attainder or corruption of blood, or any forfeiture or escheat (*a*).

In addition to the distinction as to forfeiture, which we have just seen to be a thing of the past, there are other points, some nominal, others real, which distinguish felonies from misdemeanors: Incidents of felonies and misdemeanors contrasted.

i. As to *arrest*.—It will suffice here to state generally that an arrest without warrant is justifiable in certain cases of supposed felony, where it would not be in cases of supposed misdemeanor (*b*).

ii. As to the *trial*.—Misdemeanors may be tried upon an indictment, inquisition, or information; felonies upon the first two only.

The right of peremptory *challenge* to jurors is confined to those charged with felony.

On minor points there is also a difference, *e.g.*, the form of oath taken by the jury (*c*); the mode of swearing the jury; again, in misdemeanor the defendant is not given in charge to the jury (*d*); and in felonies the prisoner must be present throughout the trial, while a case of misdemeanor may be tried although the accused be not present, if he have previously pleaded (*e*). In many cases of misdemeanor the person accused is entitled to be released on bail while awaiting his trial, whereas this is not the case if the charge is one of felony (*f*).

iii. As to the *civil remedy*.—As we have seen (*g*), the felony should be prosecuted before a civil action is commenced against the guilty person with reference to the same act; in misdemeanor there is no such necessity.

(*a*) 33 & 34 Vict. c. 23, s. 1.

(*c*) v. p. 384.

(*e*) 8th report of the Commissioners on Criminal Law, p. 143; 1 Chitty, Cr. L. 532, v. also p. 362.

(*f*) v. p. 319.

(*b*) v. pp. 311, 312.

(*d*) v. p. 385.

(*g*) v. p. 3.

CHAPTER III.

ESSENTIALS OF A CRIME.

IN order to ascertain who are and who are not capable of committing crimes, it will be necessary to examine certain terms which are liable to confusion.

In the first place, we must deal with those elements which occur in every case of crime; and the absence of either of which (except in a limited number of cases to which we will refer) excludes the act from the category of crimes, viz., *Will*, and *Criminal Intention* or *Malice*. It will be more convenient to treat of them in this order, though obviously the reverse of the actual sequence of events.

Will.

To *will* an act is to go through that inward state which, as experience informs us, is always succeeded by motion; that is, unless the body be physically incapable. And "will" is to be distinguished from those wishes which are not carried into execution; for example, excited by jealousy, I wish to kill B., but fear of the law prevents me from willing that act. If the act be not willed, it is said to be *involuntary*, and does not render its doer amenable to the criminal law.

Intention.

Intention is the "direction of conduct towards the object chosen upon considering the motives which suggest the choice" (a). The willing may succeed the intention instantaneously, or years may intervene between the formation of the intention and the exercise of the will. An example will explain the relation of the two terms

(a) Fitz. St. 69.

more clearly. A. hates B. In consequence of this hatred A., on meeting B., shoots him dead. Here A. may have made up his mind to shoot B. when he meets him; but up to this point, while the two are separated, A.'s intention only is formed. He meets B. in the road, and carries out his design or intention by pulling the trigger. Now he wills the act; that is, he wishes it in such a way as to cause the motion of his arm and finger.

In this example a third element appears. The *motive* Motive. of the act is the deadly hatred. Motive may be defined as "that which incites and stimulates to action." It may serve as a clue to the intention; but it is the intention which determines the quality, criminal or innocent, of the act.

So much for intention generally. But to make a person a criminal, the intention must be a state of mind forbidden by the law. I utter a forged note, not knowing it to be such, and therefore not intending to defraud. No crime is committed. But if I have such intention, this criminal intention stamps the act with the character of crime. The guilty state of mind, the *mens rea* or criminal intention, is often known by the term "*Malice*"; a term which is truly a legal enigma, on account of the conflicting senses in which it has been used. "*Malice*," in the common acceptation of the word, means ill-will against a particular person or persons. But in its legal sense it means a wrongful act done intentionally without just cause or excuse. As synonymous with criminal intention, it is necessary to the legal conception of crime, and to secure a conviction, as a general rule, malice of this kind must be directly proved. But when the law expressly declares an act to be criminal, the question of intention or malice need not be considered; except by the judge in estimating the amount of punishment (a).

(a) Broom, C. L. 993; *Cundy v. Le Cocq*, L. R. 13 Q. B. D. at p. 209.

Malice, active
or passive.

This malice is found not only in cases,

I. Where the mind is *actively* or *positively* in fault, as where there is a deliberate design to defraud, but also

II. Where the mind is *passively* or *negatively* to blame, that is, where there is culpable or criminal inattention or negligence. A common example of this is manslaughter by a surgeon who has shown gross incompetence in the treatment of the deceased. But here the criminality consists in the wilfully incurring the risk of causing loss or suffering to others (a). So that, in fact, the malice is only traced one stage further back. An extreme case of this negative malice is where there is merely the absence of a thought which ought to have been there, as in the non-repair of roads through forgetfulness.

Malice, express
or implied.

It is usual to lay down that malice is either

1. *Express*, or *in fact*, as where a person with a deliberate mind and formed design kills another.

2. *Implied*, or *in law*, as where one wilfully poisons another, though no particular enmity can be proved; or where one gives a perfect stranger a blow likely to produce death. Here there is a wilful doing of a wrongful act without lawful excuse; and the intention is an inference of law resulting from the doing the act (b). The law infers that every man must contemplate the necessary consequences of his own act (c) and moreover that every act, in itself unlawful, is wrongfully intended, or in other words "malicious," until the contrary is proved.

Here, and everywhere in dealing with malice, there is danger of the student being led astray by the moral signification of the word, as denoting ill-will or malevolence. In other words, of confounding motive with criminal intention. Malice, in the sense of malevolence, is not essential to a crime; malice, in its legal signification of criminal intention, as a general rule, is.

(a) Broom, C. L. 995.

(b) 4 Bl. 200, v. post, p. 153.

(c) *R. v. Dixon*, 3 M. & Sel. 15.

As we have seen, it is the character of the *intention* that determines the character of the act; though other considerations, for example, motives, are taken into account in order to discover the intention. The same act may be wholly innocent, a civil injury, or a crime, according to the intention. For example, A. takes a horse from the owner's stable without his consent. If he intend to fraudulently deprive the owner of the property and appropriate the horse to himself, he is guilty of the crime of larceny. If he intend to use it for a time and then return it, it is a trespass or civil injury only. If he take it in due course as distress for rent, he is justified and not exposed to any ill consequences (a).

Intention,
the test of
criminality.

If there be present a criminal intention, the prisoner is not exculpated because the results of the steps he takes to carry out that intention are other than those he anticipated or intended. For example, if A., intending to shoot B., shoots C., mistaking C. for B. The act, viz., the shooting, is willed, and the intention is criminal (and felonious); therefore the essentials of a crime are furnished.

We have already suggested that there are exceptions to the rule that a criminal intention is necessary to constitute a crime, or as that rule has been expressed, *Nemo est reus nisi mens sit rea*. It is not altogether easy to systematize or define these exceptions, the number of which modern legislation has tended to increase, but it may be observed that they are only to be found among the minor offences, and generally among those offences which have been created by statute. They may, however, be referred to three classes (b). The first class includes acts not criminal in any real sense, but which in the public interest have been prohibited by statute under a penalty, e.g., the innocent possession of liquorice by a

*Nemo est reus
nisi mens sit
rea.*
Exceptions to
rule.

(a) Broom, C. L. 993

(b) See the judgment of Wright, J., in *Sherras v. De Rutzen*, L. R. [1895] 1 Q. B. at p. 921; *Coppen v. Moore*, L. R. [1898] 2 Q. B. at p. 312.

beer retailer, or of adulterated tobacco by a dealer in tobacco. The second class comprehends some and perhaps all public nuisances, for which a man may be held criminally responsible although the nuisance is committed by his servants without his knowledge, or even contrary to his orders. There is a third class of cases which mostly fall within the laws as to adulteration or merchandise marks, or the sale of intoxicating liquors, in which the Court has come to the conclusion that, having regard to the clearly expressed language, and to the scope and object of the statutes dealing with the offences which they created, the Legislature intended to fix criminal responsibility upon a master for acts done by his servant in the course of his employment, even though the master may have expressly prohibited them.

Attempts.

Though a mere intention is not punishable if no steps are taken to carry it into effect, an *attempt* to commit a crime is itself a crime, and therefore the subject of punishment. An attempt may be said to be the doing of any of the acts which must be done in succession before the desired object can be accomplished; with the limitation that the attempt must be an act directly approximating to the commission of the offence. Thus, procuring a die for coining was held an act in furtherance of the criminal purpose sufficiently proximate to the offence (a). but not so the buying a box of matches for setting a stack of corn on fire (b).

Every attempt to commit a crime is itself an indictable misdemeanor at common law. In some cases, it is specially provided that it shall amount to a felony, *e.g.*, attempt to murder (c).

Verdict of attempt on indictment for the complete crime.

If on the trial of a person charged with felony or misdemeanor, the jury do not think that the offence was completed, but, nevertheless, are of opinion that an

(a) *R. v. Roberts*, 25 L. J. (M.C.) 17.

(b) *R. v. Taylor*, 1 F. & F. 511. As to an attempt to pick an empty pocket, *v. p.* 209.

(c) 24 & 25 Vict. c. 100, ss. 11-15.

attempt was made, they may find a verdict to that effect. The prisoner is then dealt with as if he had been convicted on an indictment for the attempt (*a*). But it has been held that such a verdict cannot be found where the attempt itself has been made a felony by statute, as an attempt to murder (*b*).

(*a*) 14 & 15 Vict. c. 100, s. 9.

(*b*) *R. v. Connell*, 6 Cox, 178.

CHAPTER IV.

PERSONS CAPABLE OF COMMITTING CRIMES.

Exemptions
from criminal
responsibility.

EVERY man must be presumed to be responsible for his acts until the contrary is clearly shown. If an act ordinarily falling within the scope of the criminal law be committed, the law presumes that it was done wilfully and with malicious intent. Therefore it lies on the accused to rebut this presumption.

There are certain exemptions from criminal responsibility, or rather, under certain circumstances, acts which would otherwise be criminal are on some special ground not deemed so. The foregoing examination of the essential elements of crime enables us to determine what is the nature of these exemptions; inasmuch as they are founded, as a rule, on the absence of one of those essentials. In one or two instances, however, other considerations, either of policy or well-advised lenity, are entertained, *e.g.*, in the case of crimes committed by ambassadors.

Classification
of exemptions.

The several instances of irresponsibility may be reduced to the following classes:—

1. Absence of criminal intention or malice, including:—

Insanity : Infancy : Ignorance (mistake.)

2. Absence of will, *i.e.*, the act is purely involuntary:—

Misfortune, &c. : Physical compulsion.

3. Instant and well-grounded fear, stronger than the fear naturally inspired by the law:—

Fear of excessive unlawful harm. Coercion of married women by their husbands.

In each of these cases (1-3) the fear of punishment is not calculated to act upon the person so as to deter him, or to deter others by making him an example ; therefore the punishment would be useless.

4. When an act, under ordinary circumstances criminal, is denuded of that character, inasmuch as it is directly authorised by the law :—

In pursuance of legal duty ; *e.g.*, the sheriff hanging a criminal.

In pursuance of legal right ; *e.g.*, slaying in self-defence.

Here, as in the first class, there is no criminal intention.

Each of these grounds of exemption must now be dealt with.

Insanity.—With regard to no subject in criminal law 1a. Insanity. has there been so much obscurity and uncertainty as on the question of the responsibility or irresponsibility of a prisoner when the state of his mind at the time of the commission of the act is the point at issue. The subject is one on which the views taken by medical men often differ widely from those taken by lawyers ; and the former are generally the most important witnesses in cases of alleged insanity, it sometimes becomes difficult to reconcile their evidence with the rules of law on the subject.

Two classes of mental alienation are usually recognised :— Idiocy and insanity.

1. *Dementia naturalis*, or *a nativitate*—in other words, *idiocy*, or absence of understanding from birth, without lucid intervals : a person deaf and dumb from birth is by presumption of law an idiot, but it may be shown that he has the use of his understanding.

2. *Dementia accidentalis*, or *adventitia*—usually termed *insanity*. The mind is not naturally wanting or weak, but is deranged from some cause or other. It is either *partial* (insanity upon one or more subjects, the party being sane upon all others) or *total*. It is also either *permanent* or *temporary*, the object of it in the latter case being afflicted with his disorder at certain periods only, with lucid intervals (*a*).

History of the law as to insanity.

Three stages in the history of the law as to insanity may be discerned. The first may be illustrated by the following dictum of an English judge in the year 1724 :—A man who is to be exempted from punishment “ must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast ” (*b*). The second stage regarded as the test of responsibility the power of distinguishing right from wrong in the abstract (*c*). The third and existing doctrine dates from the trial of M’Naughten in the year 1843 (*d*).

M’Naughten’s Case.

In M’Naughten’s case certain questions were propounded by the House of Lords to the judges. The substance of their answers was to the following effect :—“ To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.” Thus the question of knowledge of right or wrong, instead of being put generally and indefinitely, is put in reference to the *particular act* at the *particular time* of committing it.

(a) v. Bac. Abr. Idiots. As to *dementia affectata*, or drunkenness, v. p. 20.

(b) *R. v. Arnold*, 16 How. St. Tr. 764.

(c) *R. v. Bellingham* [1812], Collinson on Lunatics, 671.

(d) 10 Cl. & Fin. 200; 1 C. & K. 130.

As to *partial* insanity, that is, when a person is sane on all matters except one or more, the judges declared that "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." And again, "Notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time of committing such crime that he was acting contrary to the law of the land."

Partial
insanity.

It has been held that an apparent absence of motive for the deed is not any ground for inferring an irresistible and insane impulse; and that though there be an irresistible impulse, if there be also a full possession of reasoning powers, it affords no defence (a).

Absence of
motive, and
irresistible
impulses.

As to *medical* evidence on the question of insanity—a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they in his opinion, indicate insanity. But he cannot be asked, although present in Court during the whole trial, whether from the evidence he has heard he is of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind; for such a question, unlike the previous one, involves the determination of the truth of the evidence, which it is for the jury to determine (b).

Evidence of
medical wit-
nesses.

The law presumes sanity: and, therefore, the burden

Trial, when
insanity is
pleaded.

(a) *R. v. Haynes*, 1 F. & F. 666. *R. v. Barton*, 3 Cox, 275.

(b) *R. v. Frances*, 4 Cox, 57. See also *M'Naughten's Case*.

of the proof of insanity lies on the defence. Even in the case of an acknowledged lunatic, the offence is presumed to have been committed in a lucid interval, unless the contrary be shown. It is for the petty jury to decide whether a case of insanity, recognised as such by the law, has been made out. The grand jury have no right to ignore a bill on the ground of insanity (*a*). The jury are obliged to attend to the directions of the judge as to what is the law on the subject. When evidence is given of the insanity of the prisoner at the time of the commission of the offence, and it appears to the jury that he did the act charged, but was insane at the time when he committed it, they must find a special verdict to the effect that the accused is guilty, but was insane at the time of the commission of the offence. If such a verdict is found the Court will order the accused to be kept in custody as a criminal lunatic in such place and in such manner as it shall think proper, till the Queen's pleasure be known; and the Queen may order the confinement of such person during her pleasure (*b*). So if a person indicted is insane, and upon arraignment is found to be so by a jury impanelled to discover his state of mind, so that he cannot be tried; or if on his trial, or when brought up to be discharged for want of prosecution, he appears to the jury to be insane, the Court may record such finding, and order him to be kept in custody till the Queen's pleasure be known (*c*).

In accordance with the dictates of humanity no criminal proceedings can be taken against a man when he is *non compos mentis*. Thus, if a man commit murder and become insane before arraignment, he cannot be arraigned; if after trial before judgment, judgment cannot be pronounced; if after judgment before execution, execution will be stayed.

Drunkenness
not an excuse.

Drunkenness.—Drunkenness is sometimes termed *de-*

(*a*) *R. v. Hodges*, 8 C. & P. 195.

(*b*) 46 & 47 Vict. c. 38, s. 2.

(*c*) 39 & 40 Geo. III. c. 94, s. 2.

mentia affectata—acquired madness. A state of voluntary intoxication is not any excuse for crime (*a*). It is evident that if drunkenness were allowed to excuse, the gravest crimes might be committed with impunity by those who either counterfeited the state or actually assumed it.

It would, however, be incorrect to say that the consideration of drunkenness is never entertained in the criminal law. Though it is no excuse for crime, yet it is sometimes an index of the quality of an act. Thus, in a case where the intention with which the act was done is the essence of the offence the drunkenness of the accused may be taken into account by the jury when considering the motive or intent with which he acted; for example, on the question whether a person who struck a blow was excited by passion or acted from ill-will; whether expressions used by the prisoner were uttered with a deliberate purpose, or were merely the idle expressions of a drunken man (*b*). So a person cannot be said to have *intended* suicide if he were so drunk that he did not know what he was doing (*c*).

When to be considered.

If the drunkenness be involuntary, as for example, if it be by the contrivance of the prisoner's enemies, he will not be accountable for his action while under that influence (*d*). Also, if drunkenness has been so far persisted in, as to produce the disease of insanity, or such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, this, equally with other kinds of mental disease, may be pleaded in defence (*e*).

Infancy.—Infancy can be used in defence only as evidence of the absence of criminal intention, though

ib. Infancy, an excuse for crime.

(*a*) *v. Pearson's Case*, 2 Lew. C. C. 144.

(*b*) *R. v. Thomas*, 7 C. & P. 817; *v. also R. v. Cruse*, 8 C. & P. 541; Warb. L. C. 22; *R. v. Doherty*, 16 Cox, C. C. 306; Warb. L. C. 260.

(*c*) *R. v. Moore*, 3 C. & K. 319.

(*d*) 1 Hale, P. C. 32.

(*e*) *R. v. Davis*, 14 Cox, 563.

there are certain presumptions of law on the subject, some of which may, and some may not, be rebutted.

The age of discretion, and therefore of responsibility, varies according to the nature of the crime. What the law technically terms "infancy" does not terminate till the age of twenty-one is reached; but this is not the criterion in criminal law. Two other ages have been fixed as points with reference to which the criminality of an act is to be considered.

First period.

Under the age of *seven*, an infant cannot be convicted of a felony, or even, it is stated, of any indictable offence (*a*); for until he reaches that age he is presumed to be *doli incapax*; and the law does not permit this presumption to be rebutted by even the clearest evidence of a mischievous discretion (*b*).

Second period.

Between *seven* and *fourteen*, he is still, *prima facie* deemed by law to be *doli incapax*; but this presumption may be rebutted by clear evidence of such mischievous discretion, or, in other words, that the person accused had a guilty knowledge that he was doing wrong (*c*), the principle of the law being *malitia supplet aetatem*. Thus, a boy of the age of ten years was hanged for killing his companion; he having manifested a consciousness of guilt, and a discretion to discern between good and evil, by hiding the body (*d*). There is one exception to this rule, grounded on presumed physical reasons. A boy under the age of fourteen cannot be convicted of rape or similar offences, even though he has arrived at the full state of puberty (*e*). He may, however, be convicted as principal in the second degree, *i.e.*, of aiding and assisting others, if he be proved to be of a mischievous discretion (*f*).

(*a*) 4 St. Bl. 20.

(*b*) A *præsumptio juris et de jure*, v. p. 431.

(*c*) A *præsumptio juris*, v. p. 431. *R. v. Owen*, 4 C. & P. 236; Warb. L. C. 17.

(*d*) 1 Hale P. C. 26, 27; v. *York's Case*, Fost. 70.

(*e*) *R. v. Jordan*, 9 C. & P. 118.

(*f*) *R. v. Eldershaw*, 3 C. & P. 396.

Between *fourteen* and *twenty-one*, an infant is presumed Third period. to be *doli capax*, and accordingly, as a rule, may be convicted of any crime, felony, or misdemeanor. But this rule is subject to exceptions, notably in the case of offences consisting of mere non-feasance; as, for example, negligently permitting felons to escape, not repairing highways, &c. It is given as a reason for the exemption in cases of the latter character that, not having the command of his fortune till he is twenty-one, the person wants the capacity to do those things which the law requires (a).

Though, as we have seen, infants who have arrived Juvenile offenders. at years of discretion are not to be allowed to commit crimes with impunity, we shall find that in certain cases the law deals with juvenile offenders in an exceptional way, in order, if possible, to prevent their becoming confirmed criminals (b).

Ignorance (including mistake).—Two kinds of ignorance ic. Ignorance as an excuse for crime. Ignorance of law. must be distinguished—Ignorance of Law—Ignorance of Fact. It is a leading principle of English law that ignorance of law in itself will never excuse. Though it is implied in some of the excuses of which we have treated, *e.g.*, infancy, the ignorance of the law is not the ground of exemption (c). It is no defence for a foreigner charged with a crime committed in England that he did not know he was doing wrong, the act not being an offence in his own country (d).

Ignorance or mistake of fact will or will not excuse, Ignorance of fact. according as the original intention was or was not lawful. For example, if a man, intending to kill a burglar breaking into his house, kill his own servant, he will not be guilty of an offence. But if, intending to do grievous bodily harm to A., he, in the dark, kill B., he will be guilty of murder.

The cases we have been noticing are those in which the exemption from the normal liability is grounded on

(a) 4 Bl. 22.

(c) v. Austin, 499.

(b) v. p. 478.

(d) *R. v. Esop*, 7 C. & P. 456.

the absence of criminal intention or malice. Those in which the ground of exemption is absence of will, or, in other words, involuntary acts, require very little consideration.

2a. Accident,
&c., as an
excuse for
crime.

Accident (including misfortune, mishap, &c.).—To be valid as an excuse, the accident must have happened in the performance of a lawful act with due caution. For example, A., properly pursuing his work as a slater, lets fall a slate on B.'s head; B. dies in consequence of the injury. Here A. will not be liable; but it would have been otherwise had he at the time been engaged in some criminal act; or if he had not exercised proper skill or care. We shall find cases of this description most frequently in drawing the line between culpable and excusable homicide.

2b. Physical
compulsion.

Physical Compulsion.—As if A. kills B. with C.'s hand.

The third division comprises cases where the act is done under a fear stronger than that which the law inspires.

3a. *Duress per
minas.*

Fear of Great and Unlawful Harm.—It is believed that in only one class of cases, viz., where compulsion by threats has been applied by rebels or rioters, has the excuse been allowed that an offence was committed under threats of personal violence or injury (a), the reason given for the exception being that in times of public insurrection and rebellion the person offending may be under so great pressure as to be unable to resist, there being no legal tribunal or officer of justice to whom he can appeal. But in a time of peace, though a man be violently assaulted, and have no other possible means of escaping death but by killing an innocent person, if he commit the act he will be guilty of murder; for he ought rather to die himself than escape by the murder of an

(a) *R. v. M'Grouther*, Fost. 13; 18 How. St. Tr. 391. 2 St. Hist. Cr. Law, 106. v. also *R. v. Crutchley*, 5 C. & P. 133; and *R. v. Tyler and Price*, 8 C. & P. 616; Warb. L. C. 29.

innocent man. But in such case he may kill his assailant (a).

State of Married Women.—In many cases of *felony*, if a married woman commits the crime in the presence of her husband, the law presumes that she acts under his coercion, and therefore excuses her from punishment. But this exemption is not allowed in all felonies, though it seems unsettled where the line is drawn. It appears that the wife is liable in treason, murder, manslaughter, and robbery (b). In no case is she excused if her husband be not present, not even if the act be done by his order (c). The presumption of law may be rebutted by evidence. Thus, if it can be shown that she acted voluntarily, and was the principal actor and inciter of the crime, she may be convicted, although her husband were present (d).

3b. Married women, when not responsible.

In cases of *misdemeanor*, the prevailing opinion seems to have been that the wife is responsible for her acts, although her husband be present at the commission. However, in recent cases, this has been doubted, and the rule prevailing in felony applied (e). At any rate, the exemption does not extend to those offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, as for keeping a disorderly or gaming house.

It requires the co-operation of two persons at least to constitute a conspiracy. Of this crime, therefore, a husband and wife cannot by themselves be convicted, inasmuch as in the eye of the law they are regarded as one person. So a wife cannot be convicted of stealing her husband's goods, except under the Married Women's Property Act,

(a) 1 Hale P. C. 51.

(b) *R. v. Manning*, 2 C. & K. 903; *R. v. Cruse*, 8 C. & P. 541; Warb. L. C. 22; 1 Hale, P. C. 45-48; 1 Hawk. c. i. s. 11; 1 Russ. 139; Starkie on Evidence, tit. Husband and Wife.

(c) *Brown v. Att.-Gen. of New Zealand*, 67 L. J. (P. C.) 7; 77 L. T.

414-

(d) 1 Hale P. C. 516; *R. v. John*, 13 Cox, at p. 107.

(e) *R. v. Price*, 8 C. & P. 19.

1882(a); nor of harbouring him when he has committed a crime.

No other
relation an
excuse.

This relation of wife to the husband is the only one which the law recognises as a shield from criminal punishment. The other private relations, parent and child, master and servant, will not excuse the commission of any crime; either child or servant being liable, notwithstanding the command or coercion of the parent or master.

Certain exceptional cases, where the ordinary rules as to capability of committing crime do not entirely prevail, require a brief notice.

The sovereign
and crime.

The Sovereign.—The sovereign can do no wrong: therefore he is not amenable to the ordinary criminal courts of his kingdom. Blackstone forbids us even to imagine such delinquency on the part of the sovereign. "He is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime. We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the king were to act thus and thus; since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance" (b). Inasmuch as it is presumed that he could do no wrong, although he commands an unlawful act to be done, *e.g.*, an unlawful arrest, the instrument is not indemnified, but is punishable.

Offences by
corporations.

Corporations.—Even corporations aggregate, such as railway companies, may be indicted by their corporate names for breaches of duty; whether such breaches consist of wrongful acts, *e.g.*, obstructing highways; or wrongful omissions, *e.g.*, neglecting to repair bridges (c).

(a) 45 & 46 Vict. c. 75, s. 16; v. p. 206.

(b) 4 Bl. 33.

(c) *R. v. Great North of England Railway Co.*, 9 Q. B. 315; 10 Jur. 755.

Aliens.—Foreigners who commit crimes in England are punishable exactly as if they were natural-born subjects. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act not being an offence in his own country. Though this is no defence, it may mitigate the punishment (*a*). Aliens and crime.

Ambassadors.—Different views, materially conflicting with each other, have been held as to the criminal liability of ambassadors and their suites. Some writers maintain that for no offence, whether it be against the life, person, or property of an individual, is an ambassador amenable to the criminal law of the country to which he is sent (*b*). Others assert that though he is not punishable for crimes made such by the laws of the particular country, he is so for any great crimes which must be such in any system. Or, as it is sometimes expressed, he is punishable for *mala in se*, but not for acts which are merely *mala quia prohibita*. Thus, an ambassador might be convicted for murder or rape, but not for smuggling. Ambassadors and crime.

There is one class of offences which, if committed by an ambassador or one of his suite, might stand on a different footing, namely, offences affecting the existence and safety of the state. For a direct attempt against the life of the sovereign, it is said that the offender would be directly punishable by the state (*c*). But, at any rate, in this and other offences against the government, the state might demand the punishment of the offender by the foreign state; and if this demand were not complied with might treat him as a public enemy, and demand satisfaction from that foreign state. The matter would then pass from the province of law to that of politics.

(*a*) *R. v. Esop*, 7 C. & P. 456.

(*b*) Phillimore's International Law, vol. ii. part vi. c. 7.

(*c*) 1 Hale, P. C. 96-99; Fost. 187, 188.

CHAPTER V.

PRINCIPALS AND ACCESSORIES.

Principals and accessories in felonies.

THOSE who are implicated in the commission of crimes are either *Principals* or *Accessories*. This distinction is based on the consideration whether the party was present or absent at the commission. It is recognised in felonies alone.

Principals (*i.e.*, those present) are either

Principals in the first degree, or Principals in the second degree.

Accessories are either

Accessories before the fact, or Accessories after the fact.

Of these in their order :—

What constitutes a principal in the first degree ;

Principal in the first degree.—He who is the actor or actual perpetrator of the deed. It is not necessary that he should be actually present when the offence is consummated ; thus, one who lays poison or a trap for another is a principal in the first degree. Nor need the deed be done by the principal's own hands ; for it will suffice if it is done through an innocent agent, as for instance, if one incites a child or a madman to murder.

In the second degree.

Principal in the second degree.—One who is present aiding and abetting at the commission of the deed (*a*). This presence need not be actual ; it may be construc-

(*a*) Principals in the second degree are frequently termed *aiders* and *abettors* ; sometimes also *accomplices*. The latter term, however, may include all *participes criminis*.

tive. That is, it will suffice, if the party has the intention of giving assistance, and is sufficiently near to give the assistance; as when one is watching outside, while others are committing a felony inside the house. There must be both a participation in the act and a community of purpose (which must be an unlawful one) at the time of the commission of the crime. So that, as to the first point, mere presence or mere neglect to endeavour to prevent a felony will not make a man a principal; as to the second, acts done by one of the party, but not in pursuance of the arrangement, will not render the others liable.

The distinction between principals of the first and of the second degree is not practically a material one, inasmuch as the punishment of offenders of either class is generally the same.

Accessories are those who are not (a) the chief actors in the offence, nor (b) present at its performance, but are some way concerned therein, either before or after the fact committed (a).

Accessory before the fact.—One who, being absent at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony (b). The bare concealment of a felony about to be committed does not make an accessory. It is not necessary that there should be any direct communication between the accused and the principal; as if A. requests B. to procure the services of C. in order to murder D.

What constitutes an accessory before the fact.

The accessory will be answerable for all that ensues upon the execution of the unlawful act commanded, at least for all probable consequences: as, for instance, if A. commands B. to beat C., and he beats him so that he die, A. is accessory to the murder. But if the principal intentionally commits a crime essentially different from that commanded, the person commanding will not be

What such accessory is answerable for.

(a) 4 Bl. 35.

(b) 1 Hale, P. C. 615.

answerable as accessory for what he did not command. Thus, if A. commands B. to break into C.'s house, and B. sets fire to the house, A. cannot be convicted of the arson. But a mere difference in the mode of effecting the deed, or in some other collateral matter, will not divest the commander of the character of accessory if the felony is the same in substance. Thus, if A. commands B. to kill C. by poison, and he kills him with a sword, A.'s command suffices to make him an accessory.

Accessories
before the
fact in man-
slaughter.

With regard to manslaughter.—As a rule the offence is sudden and unpremeditated, and this view of the nature of the crime having been taken, it has been said that there can be no accessory before the fact in manslaughter. But in many cases there is deliberation, though it is not accompanied by an intention to take away life. It is easy to present a case in which there may be an accessory before the fact to manslaughter. A. counsels B. to mischievously give C. a dose of medicine merely to make him sick, and C. dies in consequence; A. is guilty as an accessory before the fact to the manslaughter (a).

Trial of acces-
sories before
the fact.

As to the trial of those who command, counsel, or procure the commission of a felony.—Until a recent date it was the rule that such a person could not without his own consent be tried except at the same time with the principal, or after the principal had been tried and found guilty. He was merely an accessory, and therefore he could not be tried before the fact of the crime was established. Now two courses are open to the prosecution; either (a) to proceed, as formerly, against the person who counsels, &c., as an accessory before the fact, together with the principal felon, or after his conviction; or, (b) to indict the counsellor for a substantive felony (for to that his offence is declared by the statute to amount), and this may be done whether the principal has or has not been convicted, and although he is not

(a) *R. v. Gaylor*, 7 Cox, 253.

amenable to justice (*a*). The punishment in either case is the same. If one of these two modes has been adopted, of course the offender cannot be afterwards prosecuted in the other. It is also provided that an accessory before the fact may be indicted, tried, convicted, and punished in all respects as if he were a principal felon (*b*). To convict of the substantive felony under this Act, it is still necessary to prove that the principal deed has actually been committed. Soliciting and inciting to the commission, if the deed is not committed, is only a misdemeanor (*c*).

Accessory after the fact.—One who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon (*d*). What is required to make a person an accessory after the fact? (a) There must have been some felony committed and completed; (b) the party charged must have had notice, direct, or implied, at the time he assisted, &c., the felon, that he had committed a felony; (c) he must have done some act to assist the felon personally. It will suffice if there has been any assistance given in order to hinder the felon's apprehension, trial, or punishment; for example, concealing him in the house, supplying him with horse or money to facilitate his escape. But merely suffering the principal to escape will not make the party an accessory after the fact (*e*).

What constitutes an accessory after the fact.

Receiving stolen goods, knowing them to have been stolen, is generally treated as a separate offence; the receiver being convicted of a felony, misdemeanor, or summary offence, according as the stealing of the property is a felony, misdemeanor, or offence punishable on summary conviction (*f*). If, however, the stealing, obtaining, &c., is a felony, the receiver may be indicted

Receivers, how tried.

(a) 24 & 25 Vict. c. 94, s. 2. (b) *Ibid.* s. 1.
 (c) *R. v. Gregory*, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60; 16 L. T. 388; 15 W. R. 774; Warb. L. C. 14.
 (d) 1 Hale, P. C. 618.
 (e) 1 Hale, P. C. 618, &c.; *R. v. Chapple*, 9 C. & P. 355.
 (f) v. p. 220.

either as an accessory after the fact, or for a substantive felony (*a*).

Wife not an
accessory after
the fact.

We have noticed (*b*) that, as a rule, the wife is protected from criminal liability for acts committed in the presence of her husband. Much more, then, can she claim this immunity when the offence with which she is charged is that of relieving and assisting her husband after he has committed a felony. There is no exemption in respect of any other relation. Even the husband may be convicted for assisting his wife (*c*).

Accessory
after the fact,
how tried.

An accessory after the fact to a felony may be tried in the same manner as an accessory before the fact; that is, either as an accessory with the principal, or after his conviction, or as for a substantive felony, independently of the principal (*d*). But where an indictment contains two counts, the first charging the accused person as principal in a felony, the second charging him as accessory after the fact to the same felony, the prosecution must elect upon which count they will proceed (*e*).

He is, in general, punishable with imprisonment for any term not exceeding two years (with or without hard labour), and may also be required to find security for keeping the peace, or, in default, to suffer additional imprisonment for a period not exceeding one year (*f*). But an accessory after the fact to murder may receive sentence of penal servitude for life, or for any term not less than three years, or imprisonment not exceeding two years (*g*). A receiver of stolen goods is liable to a maximum punishment of penal servitude for fourteen years (*h*).

It has been observed that the distinction of principals and accessories is found only in the case of felonies.

In treason, all
are principals.

As to *treason*—The same acts which in a felony would

(*a*) 24 & 25 Vict. c. 96, s. 91.

(*c*) 1 Hale P. C. 48, 621.

(*e*) *R. v. Brandon*, 14 Cox, 394.

(*g*) 24 & 25 Vict. c. 100, s. 67.

(*b*) v. p. 25.

(*d*) 24 & 25 Vict. c. 94, s. 3.

(*f*) 24 & 25 Vict. c. 94, s. 4.

(*h*) 24 & 25 Vict. c. 96, s. 91.

make a man an accessory before or after the fact, will in treason make the offender a principal traitor. This rule is said to exist *propter odium delicti*.

As to *misdemeanors*—Those who aid or counsel the commission of the crime are dealt with as principals (a); those who merely assist after the misdemeanor has been committed are not punishable (b), unless indeed the act amount to the misdemeanor of rescue, obstructing the officer, or the like. The same applies to offences punishable on summary conviction (c). In misdemeanors, no accessories.

The following outline of the present state of the law on the subject of degrees of guilt may serve to place the matter in a clearer light :— Recapitulation.

There are no accessories in treason or misdemeanors, only in felonies.

Principals, whether of the first or second degree, are virtually dealt with in the same way.

Accessories, whether before or after the fact, may be treated as such, or charged with a substantive felony; but if once tried in either of these capacities, the other may not be afterwards resorted to.

Accessories before the fact receive the same punishment as principals; accessories after the fact generally imprisonment not exceeding two years.

In the following imaginary case examples of each of the four kinds of participation in a crime will be found. A. incites B. and C. to murder a person. B. enters the house and cuts the man's throat, while C. waits outside to give warning in case any one should approach. B. and C. flee to D., who knowing that the murder has been completed, lends horses to facilitate their escape. Here B. is principal in the first degree, C. in the second degree, A. is accessory before the fact, D. after the fact.

(a) 24 & 25 Vict. c. 94, s. 8. (b) *R. v. Greenwood*, 21 L. J. (M.C.) 127.

(c) 11 & 12 Vict. c. 43, s. 5.

BOOK II.

Plan of the
book.

IT will be advisable to adopt some logical plan in treating of the various offences which come under the cognisance of tribunals of criminal jurisdiction. Though, of course, crimes which primarily affect the state or the public also affect the individuals who constitute that state or public, and crimes which in their immediate effect injure individuals indirectly are productive of public evil, yet the division of crimes into *Offences of a Public Nature* and *Offences of a Private Nature* or *against Individuals*, may be resorted to without fear of confusion. There are other possible modes of arrangement; for example, according to the different tribunals before which, or the different processes by which, the crimes are prosecuted (as in the French Penal Code), according to the punishments with which the crimes are visited, &c.

Taking as the main division that indicated above, the general order will be determined, as far as possible, by the wideness of the province of the various crimes, thus commencing with offences against the law of nations. For the present no notice other than that which is merely incidental will be taken of offences which are merely punishable on summary conviction. A special chapter will be devoted to this subject.

PART I.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

OFFENCES AGAINST THE LAW OF NATIONS.

CERTAIN offences are regarded as violating those unwritten laws which are admitted by nations in general. It must not be assumed that any state is at liberty to take upon itself the punishment of an offence against the law of nations, if such offence is committed within the territories of a foreign jurisdiction. The most that it can do in such a case is to demand that justice be done by the foreign state. But the case is otherwise if the offence is committed in parts which are considered extra-territorial, such as the high seas. In these all nations equally have an interest, and will proceed against individuals who are there guilty of offences against the law of nations.

What offences are punishable under the law of nations.

PIRACY.

The term includes both the common law offence, and also certain offences which have been provided against by particular statutes.

Piracy at Common Law.—The offence consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there (a). Each state is entitled to

Piracy at common law—what it is.

(a) 1 Russ. 260. v. also 2 St. Hist. Cr. Law, 27, 28.

Where tried.

visit the crime with the penalties which its own laws may determine (*a*). In England, formerly the proper courts for the trial of piracy were the Admiralty Courts; but later, the trial was by commissioners nominated by the Lord Chancellor, in whose number were always found some common law judges (*b*). Now, the judges sitting at the Central Criminal Court and at the assizes are empowered to try cases of piracy (*c*).

Essentials of the crime.

The robbery must be proved as in ordinary cases of that crime committed on land. The taking must be without authority from any prince or state, for a nation cannot be deemed guilty of piracy. If the subjects of the same state commit robbery upon each other it is piracy. If the injurer and the injured be of different states the nature of the act will depend on the relation of those states. If in amity it is piracy; if at enmity it is not; for it is a general rule that enemies can never commit piracy on each other, their depredations being mere acts of hostility (*d*).

The gist of the offence is the place where it is committed, viz., the high seas, and within the jurisdiction of the Admiralty (*e*).

Acts made piracy by statute.

Piracy by Statute.—By particular statutes certain acts are made piracy. Such are the following:

For any natural born subject to commit an act of hos-

(*a*) v. Manning's Law of Nations, by Amos, 121. The crime has been thus defined by text writers on international law: "The offence of depredating on the seas without being authorised by any sovereign state, or with commissions from different sovereigns at war with each other" (Lawrence's Wheaton's Elements of International Law, 1863, p. 246). The definition is framed to exclude depredations by lawfully authorised privateers, &c.

(*b*) 28 Hen. 8, c. 15. v. p. 295.

(*c*) 4 & 5 Wm. 4, c. 36, s. 22; 7 & 8 Vict. c. 2, s. 1.

(*d*) v. *In re Tivnan*, 5 B. & S. 645; 2 Sir L. Jenk. 790; 1 Sir L. Jenk. xciv.

It should be remembered that the Declaration of Paris (1856) contained a provision that privateering should be abolished, binding on the countries parties to that declaration—Russia, Turkey, England, France, Italy, Austria and Prussia.

(*e*) As to the jurisdiction of the Admiralty, v. Arch. 35-40, and *post*, p. 295.

tility upon the high seas against another of Her Majesty's subjects under colour of a commission from a foreign power (*a*), or, in time of war, to assist an enemy on the sea (*b*).

For any commander, master of a ship, or any seaman or marine, to run away with the ship or cargo, or to yield them up voluntarily to any pirate; or to consult or endeavour to corrupt any such person to the commission of such acts; or to bring any seducing message from any pirate, enemy, or rebel; or to confine the commander; or to put force upon him so that he cannot fight in defence of his ship; or to make, or endeavour to make, a revolt in the ship (*c*).

For any person to have dealings with, or render any assistance to, a pirate (*d*).

For any person to board a merchant ship and throw overboard or destroy any of the ship's goods (*e*).

The punishment for piracy was formerly death. Now the offender is liable to penal servitude to the extent of life, or to imprisonment not exceeding three years. But piracy accompanied with an assault with intent to murder, or with wounding or endangering the life of any person on board of, or belonging to, the vessel, is still punishable with death (*f*).

Punishment of piracy.

OFFENCES AS TO SLAVES.

This class of offences is connected with the last, inasmuch as the first and chief crime which we shall notice is declared to be piracy, felony, and robbery—viz., for any British subject, or person within British territory, to convey away, or assist in conveying away, any persons on the high seas as slaves, or to ship them for such purpose (*g*). The punishment formerly was death, but

(*a*) 11 Wm. 3, c. 7, s. 8, made perpetual by 6 Geo. 1, c. 19.

(*b*) 18 Geo. 2, c. 30.

(*c*) 11 Wm. 3, c. 7, s. 8.

(*d*) 8 Geo. 1, c. 24, s. 1, perpetual by 2 Geo. 2, c. 28.

(*e*) *Ibid.*

(*f*) 7 Wm. 4 & 1 Vict. c. 88, ss. 2, 3.

(*g*) 5 Geo. 4, c. 113, s. 9.

now it is penal servitude to the extent of life, or imprisonment not exceeding three years (*a*).

Dealing in slaves and certain other offences are made felonies. And it is a misdemeanor for a seaman to serve on board a ship engaged in the slave trade (*b*).

A more recent statute consolidates the law on the subject of trading in slaves ; but it preserves the provisions noticed above (*c*).

It will not be necessary to discuss any of the more obscure offences against the law of nations (*d*).

(*a*) 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(*b*) 5 Geo. 4, c. 113, ss. 10, 11.

(*c*) 36 & 37 Vict. 88. v. *R. v. Zulueta*, 1 C. & K. 215.

(*d*) As to the violation of Safe Conducts and Passports, v. 4 St. Bl. 190. Violation of the Rights of Ambassadors, 2 St. Bl. 495 ; 7 Anne, c. 12.

CHAPTER II.

OFFENCES AGAINST THE GOVERNMENT AND SOVEREIGN.

WE now have to deal with offences committed by members of the community in violation of their duties as subjects; these offences for the most part also incidentally causing injury to individuals. The full treatment which the gravity of this class of crimes would demand is happily in many cases rendered unnecessary by the rarity of their occurrence. This is especially true of the crime of treason.

TREASON (*a*).

The crime comprises the three following main classes of acts (*b*):—

Classification
of treasonable
acts.

“ 1. Compassing and imagining the queen’s death . . . including every conspiracy the natural effect of which may probably be to cause personal danger to the queen.

“ 2. Actual levying of war against the queen for the attainment by force of public objects.

“ 3. Political plots and conspiracies intending to bring about the deposition of the queen, or levying war against her, or the invasion of her territories.”

(*a*) Treason against the government was termed “*high*” treason to distinguish it from “*petit*” treason, which consisted in the murder of a superior by an inferior in natural, civil, or spiritual relation; “and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary, these being breaches of the lower allegiance of private and domestic faith, are denominated *petit* treason” (4 Bl. 75). But every offence which would previously have amounted to *petit* treason is now regarded simply as murder (9 Geo. 4, c. 31, s. 2, and 24 & 25 Vict. c. 100, s. 8), therefore there is no longer any reason for distinguishing the graver offence by the epithet “*high*.”

(*b*) Fitz. St. 87.

To these should be added adhering to the queen's enemies, *i.e.*, foreign powers with whom we are at open war, and a few acts which are of the rarest occurrence, and at the present day hardly demand any notice.

The present law on the subject dates back to an Act passed in the reign of Edward III., known as the Statute of Treasons.

25 Edw. III.
st. 5, c. 2.

By the terms of this statute, treason is committed "when a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving them aid or comfort in our realm or elsewhere, and thereof be probably (or provably, '*probablement*') attainted of open deed by people of their condition." The statute proceeds to define as other acts of treason the counterfeiting of the king's great or privy seal, or his money, and bringing false money into this realm (which offences are no longer treason); and slaying the chancellor, treasurer, or the king's judges while doing their offices.

By the "king" is to be understood the sovereign *de facto*, though he be not the king *de jure*. On the other hand, the person rightfully entitled to the crown, if not in possession, is not within the statute. The "queen" referred to is the queen consort, the queen regnant being included in the term "king." But against the husband of the queen regnant treason cannot be committed.

It is the designing that constitutes the offence of compassing the death of the king, &c. But this design must be evidenced by some overt act, so that if there be wanting either the design, as in the case of killing the king by accident, or the overt act as when the design has been formed, but laid aside before being put into execution, there can be no conviction for treason.

What will constitute an overt act? Anything wilfully done or attempted by which the sovereign's life may be endangered; for example, conspirators meeting to consult on the means of killing the sovereign (*a*); or of usurping the powers of government (*b*); writings, if published, importing a compassing of the sovereign's death, and even words advising, or persuading to what would be an overt act, will suffice as evidence of the design; but not so loose words which have no reference to any designed act (*c*). Overt act.

To constitute a levying of war against the sovereign there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature (*d*). But there need not be actual fighting: nor is the number of persons taking part in the movement material. What constitutes a levying of war.

The levying is either *direct* or *constructive*. It is direct "when the war is levied directly against the queen or her forces, with intent to do some injury to her person, to imprison her, or the like" (*e*); for example, a rebellion to depose her, or delivering up the sovereign's castle to the enemy. Constructive treason is of a very different character, the pretended end of the movement being rather the purification of the government than its overthrow. It is committed for the purpose of effecting innovations of a public and general nature by an armed force. Thus it is treason to attempt by force to alter the religion of the state, or to obtain the repeal of its laws. So it is treason to throw down *all* enclosures, open *all* prisons; but not if the attempt be to break down a particular enclosure, or to deliver a particular person from prison, because in these latter cases the design is particular and not general (*f*). Levying, direct or constructive.

The offence of adhering to the sovereign's enemies

(*a*) *R. v. Vane*, Kel. 15. (*b*) *R. v. Hardy*, 1 East, P. C. 60.
 (*c*) *v. R. v. Gordon*, Doug. 593. (*d*) *R. v. Frost*, 9 C. & P. 129.
 (*e*) 1 Hale, P. C. 131, 132. (*f*) *R. v. Dammaree*, 15 How. St. Tr. 522.

must also be evidenced by some overt act, as for example by raising troops for the enemy, or sending them money, arms, or intelligence. By the "sovereign's enemies" are meant the subjects of foreign powers with which he is at war. It appears, therefore, that a British subject, though in open rebellion, can never be deemed an enemy of the sovereign, so as to make assistance rendered to him treason within this branch of the statute (*a*).

Subsequent additions to the number of treasonable acts.

Subsequent to the Statute of Treasons parliament from time to time made other offences treason—notably several in the reign of Henry VIII., in the matter of religion. All these new treasons, however, were abrogated in the reigns of Edward VI. and Mary, and the statute of Edward III. was restored to its place as the standard of treason; but subsequent additions to the number of treasonable offences were afterwards made by the legislature. The following still remain:—

i. Endeavouring (to be evidenced by some overt act) to prevent the person entitled under the Act of Settlement from succeeding to the crown (*b*).

ii. Maliciously, advisedly, and directly, by writing or printing, maintaining that any other person has any right or title to the crown, otherwise than according to the Act of Settlement, or that the sovereign with the authority of parliament may not make laws and statutes to bind the crown and the descent thereof (*c*).

iii. Compassing, imagining, inventing, devising, or intending death or destruction, or any harm tending to death or destruction, maim or wounding, imprisonment, or restraint of the person of the sovereign (*d*).

(*a*) 1 Hale, P. C. 164; 3 Inst. 11.

(*b*) 1 Anne, st. 2, c. 17, s. 3.

(*c*) 6 Anne, c. 7.

(*d*) 36 Geo. 3, c. 7, s. 1, confirmed by 57 Geo. 3, c. 6, s. 1. The former statute also denominated certain other acts treason; but all these offences, with the exception of those against the person of the sovereign noticed above, were converted into felonies by 11 & 12 Vict. c. 12, s. 1. v. Treason-Felony, p. 45.

There are some points in connection with the pro- Procedure in
cedure in prosecutions for treason, which may be noticed prosecutions
here. for treason.

In the first place, no prosecution for treason can Limitation as
take place after three years from the commission of to time.
the offence, if it be committed within the realm, unless
the treason consists of a designed assassination of the
sovereign (a).

The prisoner indicted for treason (or misprision of Copy of indict
treason) is entitled to have delivered to him, ten days ment, &c.
before the trial, a copy of the indictment, and a list of
the witnesses to be called, and of the petty jurors, to
enable him the better to make his defence (b). But these
provisions do not apply to cases of treason in compass-
ing and imagining the death of the sovereign (or mis-
prision of such treason) where the overt act is an act
against the life or person of the sovereign. In such
cases the prisoner is indicted, arraigned, and tried in the
same manner and upon like evidence as if he stood
charged with murder, though, if he is found guilty, the
consequences are those of treason (c).

One overt act is sufficient to prove the treason, but Overt act.
any number may be mentioned in the indictment. To
this overt act, or else to it and another of the same
treason, there must be two witnesses, unless the accused
confesses willingly (d).

The prisoner may make his defence by counsel, not Prisoner's
more than two. He is also allowed to address the jury, defence.
notwithstanding that his counsel have delivered their
speeches (e).

Formerly the punishment for treason was of a most Punishment
barbarous character. Males were drawn on a hurdle to for treason.
the place of execution, and hanged, but cut down while
alive; afterwards they were disembowelled, the head

(a) 7 & 8 Wm. 3, c. 3. (b) 7 Anne, c. 21, s. 11; 6 Geo. 4, c. 50, s. 62.

(c) 39 & 40 Geo. 3, c. 93; 5 & 6 Vict. c. 51, s. 1.

(d) 7 & 8 Wm. 3, c. 3, ss. 2, 4; except in cases tried, as above, as for
murder.

(e) *R. v. Collins*, 5 C. & P. 305.

was severed from the body, the body quartered, and the quarters placed at the disposal of the sovereign. By a wholesome statute, this proceeding was deprived of its more outrageous features, and it was provided that beheading might be substituted by the sovereign, or the capital sentence might be altogether remitted (*a*). By a previous Act (*b*), the punishment of females, formerly burning alive, had been changed to hanging. Now, by the Felony Act, 1870 (*c*), the only part of the sentence which is retained in any case is the hanging, for which, however, beheading may be substituted by the sovereign.

Certain additional consequences of conviction and attainder (*d*), viz., forfeiture of lands and goods, and corruption of blood, were abolished by the statute just mentioned (*e*), but certain incapacities were at the same time attached to convictions for treason or felony (*f*).

MISPRISION OF TREASON.

Concealment
of treason.

Misprision of treason consists in the bare knowledge and concealment of treason without any assent; any degree of assent making the party a principal traitor. At common law this mere concealment, being construed as aiding and abetting, was regarded as treason, inasmuch as, it will be remembered, there is no distinction between principals and accessories in treason (*g*). It was specially enacted that a bare concealment of treason should be held a misprision only (*h*). The only punishment now is imprisonment. The party knowing of any treason must, as soon as possible, reveal it to some judge of assize or justice of the peace.

ATTEMPTS TO ALARM OR INJURE THE QUEEN.

Acts tending
to alarm the
Queen.

It will be remembered that at the beginning of the reign of Her Majesty a morbid desire for notoriety

(*a*) 54 Geo. 3, c. 146.

(*b*) 30 Geo. 3, c. 48.

(*c*) 33 & 34 Vict. c. 23, s. 31.

(*d*) A man is convicted when found guilty; he was said to be attainted when judgment had been given.

(*e*) 33 & 34 Vict. c. 23, s. 1.

(*f*) v. p. 462.

(*g*) v. p. 32.

(*h*) 1 & 2 Phil. & Mary, c. 10.

induced certain youths to annoy her by discharging fire-arms at her person, or in her presence. To put an end to this the legislature provided that deeds of this kind should be regarded as high misdemeanors (*a*). The acts enumerated are :—To discharge, point, aim, or present at the person of the queen any gun or other arms, whether containing any explosive or destructive material or not; to discharge any explosive substance near her; to strike or throw anything at her with intent to injure or alarm her, or break the public peace; or in her presence to produce any arms or destructive matter with like intent. The punishment is penal servitude to the extent of seven years, or imprisonment not exceeding three years. To this the court may add that the offender be whipped, publicly or privately, once, twice, or thrice during the term of imprisonment.

TREASON-FELONY, *or* FELONIOUS COMPASSING TO LEVY
WAR, ETC.

Certain offences which had been declared treason by statute (*b*) were by a later statute (*c*), made felonies. To these, on account of their treasonable character, the name “treason-felony” is sometimes given. The acts enumerated are—compassing, &c., (*a*) to deprive or depose the sovereign from the style, honour, or name of the crown of the United Kingdom, or other of her dominions; (*b*) to levy war against the sovereign within the United Kingdom, in order by force or constraint to compel her to change her measures or counsels, or to put force or constraint upon, or intimidate or overawe both Houses, or either House of Parliament; (*c*) to move or to stir any foreigner or stranger with force to invade the United Kingdom, or any other of the sovereign’s dominions.

Felonious compassing to depose, levy war, induce invasion.

This compassing, &c., must be evidenced by some overt act, or by something published in printing or

(*a*) 5 & 6 Vict. c. 51.

(*c*) 11 & 12 Vict. c. 12, s. 3.

(*b*) 36 Geo. 3, c. 7, s. 1.

writing (*a*). Though the facts alleged in the indictment, or proved on the trial of any person indicted under this Act for felony, amount to treason, the person is not by reason thereof entitled to be acquitted of such felony; but if tried for the felony he cannot afterwards be prosecuted for treason upon the same facts (*b*). The punishment may extend to penal servitude for life. Nothing contained in this Act lessens the force of the Statute of Treasons.

SEDITION.

Sedition, what
it consists in.

Sedition is a comprehensive term, embracing all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and the laws of the empire. The objects generally are to excite discontent and insurrection, to stir up opposition to the government, and to bring the administration of justice into contempt (*c*).

This description is somewhat vague; but in that respect it only resembles the offence itself. It is hard to lay down any decisive line, on one side of which acts are seditious, and on the other innocent. The term "sedition" is commonly used in connection with words written or spoken. It includes, however, many other acts, some of which are treated of separately; for example, training to arms, unlawful secret societies or meetings, &c.

Seditious
libels or words.

What is sufficient to constitute seditious libels or words? It may be answered generally—such political writings or words as do not amount to treason (*d*), but which are not innocent. We have already seen what constitutes treason. As to what are innocent: it is the

(*a*) A third mode was mentioned—by open and advised speaking. But prosecutions for the prohibited practice, if they were expressed merely in this manner, were not to be had beyond two years from the passing of the Act (1848–1850), 11 & 12 Vict. c. 12, s. 4.

(*b*) 11 & 12 Vict. c. 12, s. 7.

(*c*) *R. v. Sullivan*, *R. v. Pigott*, 11 Cox, 44, 45.

(*d*) Though treason itself may be said to be a kind of sedition.

right of a subject to criticise and censure freely the conduct of the servants of the Crown, whether ministerial or judicial, and the acts of the government and proceedings in courts of justice, so long as he does it without malignity, and does not impute corrupt or malicious motives (*a*). The test approved by an eminent authority is the following: "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject and creating a general dissatisfaction towards government?" (*b*).

Proving the truth of a seditious libel is no excuse for the publishing it; nor should it extenuate the punishment, inasmuch as the statute (*c*), which allows the defendant charged with libel to plead the truth under certain conditions, does not apply to seditious libels (*d*). An order of a judge at Chambers must be obtained before commencing a prosecution against a proprietor, publisher, or editor of a newspaper for any libel contained therein (*e*).

Truth of
seditious libel
no extenua-
tion.

The punishment for seditious libels or words is fine and imprisonment as a first-class misdemeanant. Punishable in the same way are slanderous words uttered to a judge or magistrate while acting in the duties of his office.

UNLAWFUL OATHS AND SOCIETIES.

Oaths.—At the end of the last century, in consequence of sedition and mutiny having being promoted by persons banding themselves together under the obligation of an oath, an act was passed to make criminally punishable those who took oaths of a certain character:—Any person administering or causing to be administered, or aiding in or being present at and consenting to such administering, any oath or engagement intended to bind any person to engage in any mutinous or seditious purpose; or to dis-

Unlawful
oaths.

(*a*) *R. v. Sullivan, &c., supra.*

(*b*) *R. v. Lovett*, 9 C. & P. 462; v. 1 Russ. 622.

(*c*) 6 & 7 Vict. c. 96, s. 6.

(*d*) *R. v. Duffy*, 2 Cox, 45; *R. v. Burdett*, 4 B. & Ald. 95.

(*e*) 51 & 52 Vict. c. 64, s. 8.

turb the peace; or to be of any society formed for such purpose; or to obey the orders of a committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose; or not to inform or give evidence against any associate or other person; or not to discover an unlawful combination or illegal act, or illegal oath or engagement—is guilty of felony. The punishment is penal servitude for a term not exceeding seven years or imprisonment not exceeding two years. The same consequences also attend *taking* such an oath when not compelled to (*a*). It will be observed that this statute is not confined to oaths administered for seditious and mutinous purposes, but applies to other unlawful combinations (*b*).

Later statutes declare (*c*) to be felony the taking or the taking part in administering any oath intended to bind a person to commit any treason, or murder, or any felony punishable with death. The punishment for such offence is penal servitude to the extent of life, or imprisonment not exceeding three years.

Oaths taken by
compulsion.

Persons taking these oaths by *compulsion* are not excused on that account unless they disclose the circumstances to a justice of the peace, one of the secretaries of state, or the privy council, within, under the first statute, four days; under the second statute, fourteen days (*d*).

Form of oath.

The oath need not be in any precise form so long as the parties understood it to have the force and obligation of an oath; therefore, of course, it is not necessary that it should be taken on the Bible (*e*).

Unlawful
societies.

Societies.—Societies whose members are required to take any oath or engagement which is unlawful under the two above-mentioned statutes of George III., or is not required or authorized by law or of which the

(*a*) 37 Geo. 3, c. 123, s. 1; 54 & 55 Vict. c. 69, s. 1 (2).

(*b*) *R. v. Marks*, 3 East, 157.

(*c*) 52 Geo. 3, c. 104, s. 1; 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(*d*) s. 2 of each statute.

(*e*) *R. v. Lovelass*, 6 C. & P. 596.

members subscribe any unauthorized test or declaration, are deemed unlawful. Also societies the names of whose members and officers are kept secret from the society at large; or which, consisting of different branches, elect committees or delegates to communicate with other societies (a). Exceptions are made in favour of societies for religious and charitable purposes and freemasons' lodges; also as to declarations approved of by two justices and registered according to the provisions of the Act.

Proceedings may be taken against persons connected with such societies either by way of summary conviction before justices, or by indictment. In the latter case penal servitude to the extent of seven years may be awarded. The proceedings must be commenced in the name of the law officers of the Crown.

OFFENCES AGAINST THE FOREIGN ENLISTMENT ACT.

The main object of this statute (b) is to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace. The necessity for some regulations is obvious. Were English subjects allowed to interfere as they thought proper in foreign wars, the state would inevitably be involved in misunderstandings with the foreign powers.

Foreign
Enlistment
Act, 1870.

Two classes of criminal acts are dealt with :—

Illegal enlistment. Illegal shipbuilding and expeditions.

Illegal Enlistment.—Doing any of the following acts within Her Majesty's dominions without the sovereign's licence is prohibited: (a) Enlisting, or inducing any other person to enlist, in the service of a foreign state at war

Offences
connected
with illegal
enlistment.

(a) 39 Geo. 3, c. 79; 57 Geo. 3, c. 19; 9 & 10 Vict. c. 33.
(b) 33 & 34 Vict. c. 90, repealing 59 Geo. 3, c. 69.

with a friendly state ; (b) leaving Her Majesty's dominions (or inducing, &c.) with intent to serve such foreign state ; (c) embarking persons under false representations in order that they may be led to enter into such service ; (d) the master or owner of a ship knowingly taking illegally enlisted persons on board ship. In each case the offender may be punished by fine, or imprisonment not exceeding two years, or both. And in the case of illegally taking on board, the ship is detained until satisfaction is given ; and illegally enlisted persons are put on shore and not allowed to return to the ship (a).

Illegally building, equipping, &c., ships.

Illegal Shipbuilding, &c.—Building, commissioning, equipping, or despatching a ship, knowing or having reasonable cause to believe (the burden of proof lying on the builder that it is not illegal) that the ship is to be employed in the service of such a state, if done without licence, is punishable in the same way, and the ship and her equipment are forfeited to the Queen. If the contract for building the ship has been made before the beginning of the war, the builder or equipper is not punishable if immediately after the issue of the Queen's proclamation of neutrality he gives notice to the Secretary of State, and insures that the ship will not be despatched until the termination of the war without the licence of the Queen (b).

Other illegal acts.

Augmenting, without licence, the warlike force of a ship in such service, by adding to the number of guns, &c., is punishable in the same way (c). So, also, preparing or fitting out without licence, or assisting in a naval or military expedition against a friendly state, with the additional consequence that the ships, arms, &c., are forfeited (d). It should be observed that the latter offence is committed whether the friendly state against which

(a) 33 & 34 Vict. c. 90, ss. 4-7.

(b) *Ibid.* s. 8, 9.

(c) *Ibid.* s. 10.

(d) *Ibid.* s. 11. v. *R. v. Sandoval*, 16 Cox, 206 ; Warb. L. C. 41 ; also *R. v. Jameson*, 65 L. J. (M.C.) 218 ; 60 J. P. 662.

the expedition is fitted out is at war with another state or not.

The offender may be tried within the jurisdiction where Trial. the offence was committed, or where the offender may be (a).

A judge of a superior court in the United Kingdom, or elsewhere of the highest British court of criminal jurisdiction, may order the trial to be had at any place within Her Majesty's dominions (b).

DESERTION, MUTINY, AND INCITING THERETO.

Any person who maliciously endeavours to seduce a person serving in Her Majesty's sea or land forces from his duty or allegiance, or incites him to any mutiny or mutinous practice, is guilty of felony. It is punishable with penal servitude to the extent of life, or imprisonment not exceeding three years. The trial may be had at the assizes for any county in England (c). Inciting to desertion or mutiny.

Other provisions of the same kind are contained in the Army Act, 1881 (d), which comes into force and remains in force for the period named in an annual Act passed for the purpose. That Act makes any person who procures or persuades a soldier to desert, or knowingly aids or assists, or conceals a soldier in deserting, liable on summary conviction to six months' imprisonment with or without hard labour (e). The deserter himself is punishable upon trial by court martial with death if on, or under orders for, active service; or if otherwise, with imprisonment or penal servitude (f). The Naval Discipline Act, 1866 (g), and the amending Act of 1884 (h), provide for the punishment by court martial and otherwise of mutiny Desertion, &c., punished under the Army Discipline and Regulation Act. Naval Discipline Act.

(a) 33 & 34 Vict. c. 90, ss. 16, 17.

(b) *Ibid.* s. 18.

(c) 37 Geo. 3, c. 70, perpetual by 57 Geo. 3, c. 7. v. 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(d) 44 & 45 Vict. c. 58.

(e) *Ibid.* s. 153.

(f) *Ibid.* s. 12.

(g) 29 & 30 Vict. c. 109, s. 10.

(h) 47 & 48 Vict. c. 39.

and other offences committed by persons subject to that Act; mutiny with violence being made punishable with death. Punishments are also provided for those who endeavour to seduce those subject to the Act from their allegiance (*a*).

ILLEGAL TRAINING AND DRILLING.

Illegal training
and drilling.

Meetings for the purpose of training or drilling to the use of arms without authority from the sovereign, or the lieutenant or two justices of the peace of the county, are illegal. Any person who is present for the purpose of training or assisting in training is guilty of a misdemeanor, and is liable to penal servitude to the extent of seven years. If he is present for the purpose of being himself trained, he is punishable with fine and imprisonment not exceeding two years. The prosecution must be commenced within six months after the offence committed. Any magistrate, constable, or peace officer may disperse such meetings, and arrest and detain any person present (*b*).

UNLAWFUL DEALINGS WITH PUBLIC STORES.

Offences re-
lating to the
public stores.

The law on this point is consolidated by the Public Stores Act, 1875 (*c*). Certain marks are appropriated by the government for the distinguishing of public stores. If any one, without lawful authority, which he must prove, applies any of these marks in or on any such stores, he is guilty of a misdemeanor, and may be imprisoned for a term not exceeding two years (*d*). If any one, with intent to conceal Her Majesty's property in such stores, obliterates these marks, wholly or in part, he is guilty of felony, and is punishable with penal servitude to the extent of seven years (*e*). The unlawful possession of public stores is punishable on summary conviction (*f*).

(*a*) See next page for general remarks as to the punishment of offences by those in the army or navy.

(*b*) 60 Geo. 3 & 1 Geo. 4, c. 1, ss. 1, 2.

(*c*) 38 & 39 Vict. c. 25.

(*e*) *Ibid.* s. 5.

(*d*) *Ibid.* s. 4.

(*f*) *Ibid.* ss. 7-11.

It is also an offence punishable on summary conviction knowingly to buy or receive from a soldier arms, ammunition, regimental clothing, military decorations, &c. ; or to be found in possession of such articles without being able to account satisfactorily for such possession (*a*).

♦
OFFENCES BY MEMBERS OF THE ARMY AND NAVY.

Offences of a strictly military nature which are punishable by a court martial scarcely fall within the purview of this work, but it may be convenient to notice them very shortly. Offences by soldiers and sailors.

As to the *army*.—It is provided by the Army Act, 1881, that every officer or private who shall incite or join any mutiny, or knowing of it shall not give notice to the commanding officer, or shall desert, or enlist in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use insolence to his superior officer, or disobey his lawful commands, shall suffer death or such other punishment as the Act prescribes for these offences. Other offences are set forth and their punishments prescribed. No person acquitted or convicted by a competent civil court is to be tried by court martial for the same offence. Army Discipline Act.

The Act does not, however, exempt soldiers from being punishable by the ordinary criminal courts. It expressly provides that nothing therein is to exempt any officer or soldier from being proceeded against by the ordinary course of law, when accused of felony or misdemeanor, or of any offence other than absenting himself from service or misconduct respecting his contract (*b*). And if a person who has been sentenced for an offence by a court martial is afterwards tried by a civil court for the same offence, that court in awarding punishment shall have regard to the military punishment he may have already undergone. Soldiers not exempt from ordinary criminal proceedings.

(*a*) 44 & 45 Vict. c. 58, s. 156.

(*b*) *Ibid.* ss. 144-162.

Naval Discipline Acts.

As to the *navy*—The Naval Discipline Act (1866) (a) and the amending Act of 1884 (b) make similar provisions for the navy as to courts martial, the trial of offences, no exemption from ordinary criminal jurisdiction, &c.

COINAGE OFFENCES.

Certain coinage offences formerly treason.

So decidedly were offences relating to the coin regarded as offences against the Government, inasmuch as they not only infringed the royal prerogative, but also were calculated to make the public faith suspected, that in the statute of Edward III. two of them were declared treason, viz., (a) the actual counterfeiting the gold and silver coin of the realm, and (b) the importing such counterfeit money with intent to utter it, knowing it to be false. These offences were, however, made felonies by a later statute (c).

The law on the subject under consideration has been consolidated (d). It will be our task to present its matter under several heads.

Counterfeiting.

A. *Counterfeit Coin*.—A distinction is made as to the kind of coin. Whosoever falsely makes or counterfeits any coin resembling, or apparently intended to resemble or pass for—

i. The current gold or silver coin of this realm, commonly called the Queen's money (e).

ii. Foreign gold or silver coin (f).

iii. The Queen's current copper coin (g),

is guilty of felony, and is punishable, in the case of gold and silver coin of the realm, with penal servitude to the extent of life; in the other cases to the extent of seven years.

(a) 29 & 30 Vict. c. 109.

(b) 47 & 48 Vict. c. 39.

(c) 2 & 3 Wm. 4, c. 34.

(d) 24 & 25 Vict. c. 99. In the present division the quoting of a section must be understood to refer to this Act.

(e) s. 2.

(f) s. 18.

(g) s. 14.

Counterfeiting

iv. Foreign coin other than gold or silver coin is a misdemeanor, punishable for the first offence with imprisonment not exceeding one year; for the second offence with penal servitude to the extent of seven years (*a*).

The offence is complete although the false coin has not been finished, or is not in a fit state to be uttered (*b*); much less is any attempt to utter necessary. Any one, not necessarily an officer from the Mint, may at the trial prove the falseness (*c*). In this offence is included that committed by persons lawfully engaged in coining, who make the coin lighter, or of baser alloy. The counterfeiting can generally only be proved by circumstantial evidence; for example, by proof of finding coining tools in working order, and pieces of the money, some in a finished, some in an unfinished state.

B. *Colouring Coin*.—Colouring, washing, &c., counter- Colouring.
feit coin, or any piece of metal with intent to make it pass for gold or silver coin; or colouring, filing, or otherwise altering genuine coin with intent to make it pass for coin of a higher degree, is a felony punishable with penal servitude to the extent of life (*d*).

C. *Impairing, &c., Gold and Silver Coin*.—Impairing, Impairing.
diminishing, or lightening any of the Queen's gold or silver coin, with the intent that it shall pass for gold or silver coin, is felony, punishable with penal servitude to the extent of fourteen years (*e*).

Having in possession any filings, clippings, dust, &c., obtained by the above-mentioned process, is a felony, the limit of penal servitude for which is seven years (*f*).

D. *Defacing Coin*.—Defacing the Queen's gold, silver, Defacing.
or copper coin, by stamping thereon any names or words,

(*a*) s. 22.

(*d*) s. 3.

(*b*) s. 30.

(*e*) s. 4.

(*c*) s. 29.

(*f*) s. 5.

although the coin be not thereby lightened, is a misdemeanor, punishable with imprisonment not exceeding one year (*a*). It should be added that coin so defaced is not legal tender; and by the permission of the Attorney-General or Lord Advocate, any person who tenders or puts off coin so debased may be brought before two magistrates, and on conviction be fined not exceeding forty shillings (*b*).

Dealing in
counterfeit
coin under its
value.

E. *Buying or Selling, &c., Counterfeit Coin at lower value.*—Any person without lawful authority or excuse (the proof whereof lies on the accused), buying, selling, receiving, or putting off any counterfeit coin for a lower rate or value than it imports, is guilty of felony. If the counterfeit be of gold or silver the extent of penal servitude is life (*c*); if copper, the limit is seven years (*d*).

Importing.

F. *Importing and Exporting Counterfeit Coin.*—Importing or receiving into the United Kingdom from beyond the seas, without lawful authority, &c., counterfeit coin resembling the Queen's gold or silver coin, knowing the same to be false and counterfeit, is a felony, punishable with penal servitude to the extent of life (*e*). It is said that importing the coin from the Queen's dominions beyond the seas does not fall within this section, because the counterfeiting there is punishable by the laws of England (*f*). Importing foreign counterfeit coin is a felony, the limit of penal servitude for which is seven years (*g*).

Exporting.

Exporting, or putting on board any vessel for the purpose of being exported from the United Kingdom any coin counterfeit of the Queen's current coin, without lawful authority, &c., is a misdemeanor punishable with imprisonment not exceeding two years (*h*).

Uttering.

G. *Uttering Counterfeit Coin.*—Tendering, uttering, or putting off counterfeit gold or silver (*i*) coin, knowing

(*a*) s. 16.
(*d*) s. 14.
(*g*) s. 19.

(*b*) s. 17.
(*e*) s. 7.
(*h*) s. 8.

(*c*) s. 6.
(*f*) v. Arch. 862.
(*i*) s. 9.

the same to be false and counterfeit, is a misdemeanor punishable with imprisonment not exceeding one year. If at the time of uttering the offender has any other counterfeit gold or silver coin in his possession, or if he within ten days utters another coin, knowing it to be counterfeit gold or silver, the punishment may extend to two years (a). If the uttering is after a previous conviction for either of these offences, or for having in possession three or more pieces of counterfeit gold or silver coin, or for any felony relating to the coin, the utterer is guilty of felony, and may be sentenced to penal servitude for life (b).

Knowingly uttering counterfeit copper coin, or having in possession three or more pieces of counterfeit copper coin with intent to utter them, is a misdemeanor punishable by imprisonment for one year (c).

Knowingly uttering counterfeit coin meant to resemble a foreign gold or silver coin, is punishable for the first offence with imprisonment not exceeding six months; for the second not exceeding two years. The third offence is a felony punishable with penal servitude to the extent of life (d).

Uttering spurious coin, *e.g.*, foreign coin, medals, pieces of metal, &c., as current gold or silver coin, with intent to defraud, is a misdemeanor punishable with imprisonment to the extent of one year (e).

H. *Having Counterfeit Coin in Possession.*—Having ^{Having in possession.} three or more counterfeit gold or silver coins in possession, knowing them to be counterfeit, and intending to utter or put them off, is a misdemeanor punishable with penal servitude for three years (f). If after previous conviction for either of the misdemeanors mentioned in sects. 9 and 10, or any felony relating to the coin, the crime is a felony, and may be punished with

(a) s. 10.
(d) ss. 20, 21.

(b) s. 12.
(e) s. 13.

(c) s. 15.
(f) s. 11.

penal servitude to the extent of life (*a*). If the coin is the Queen's copper coin the limit of the punishment is imprisonment for one year (*b*). Having in possession without lawful excuse more than five pieces of foreign counterfeit coin renders the possessor liable to a fine not exceeding forty shillings for each piece, on conviction before a justice (*c*).

Making, &c.,
coining tools.

I. *Making, &c., Coining Tools*.—Knowingly and without lawful authority, &c., making or mending, buying or selling, or having in custody or possession any coining instrument or apparatus adapted and intended to make any gold or silver coin or foreign coin, is a felony punishable with penal servitude for life (*d*). If the instruments, &c., are designed for coining the Queen's copper coin, the limit of the penal servitude is seven years (*e*).

Conveying out of the Mint, without lawful authority, &c., any coining instrument, or any coin, bullion, metal, or mixture of metals, is a felony punishable with penal servitude for life (*f*).

Trial whether
coin is
diminished or
counterfeit.

If in any case coin is suspected to be diminished or counterfeited, it may be cut, bent, &c., by any person to whom it is tendered; the loss to fall on the deliverer if the coin is found to be counterfeit or unreasonably diminished; on the person to whom tendered, if found correct (*g*). Provision is also made for the seizure by any one finding them of counterfeit coin or tools; for search for the same; and for their ultimate delivery to the officers of the Mint or other persons duly authorised to receive them (*h*).

By a more recent statute (*i*) it was declared to be a misdemeanor to make or have in one's possession for sale, any medal, cast, or coin, made of metal or of any metallic combination, and resembling in size, figure, and colour any current gold or silver coin. The punishment is im-

(*a*) s. 12.
(*d*) s. 24.
(*g*) s. 26.

(*b*) s. 15.
(*e*) s. 14.
(*h*) s. 27.

(*c*) s. 23.
(*f*) s. 25.
(*i*) 46 & 47 Vict. c. 45.

prisonment for a term not exceeding one year with or without hard labour.

CONCEALMENT OF TREASURE TROVE.

Treasure trove is defined to be any money, coin, gold, silver, plate, or bullion, found hidden *in* (not *upon*) the earth or other private place, the owner thereof not being known (a); it belongs to the sovereign or his grantees. The offence of concealing the discovery of it is a common law misdemeanor, and was formerly punishable by death; now by fine and imprisonment (b). Treasure trove.

DISCLOSURE OF OFFICIAL SECRETS.

It has been found necessary to protect the public service by preventing the improper obtaining or disclosure of official information. Disclosure of official secrets.

Whoever for the purpose of wrongfully acquiring information, enters a fortress, arsenal, ship, &c., in which he is not entitled to be, or, whether he be in such a place lawfully or unlawfully, obtains any document, sketch, model, &c., which he is not entitled to obtain, or who for the like purpose makes any sketch or plan of a fortress, arsenal, &c., belonging to Her Majesty, is guilty of a misdemeanor punishable by imprisonment with or without hard labour for one year, or to a fine, or to both. A person who has possession of or control over such information, or who has been entrusted by some officer under Her Majesty with information as to any of the above-mentioned places, or as to Her Majesty's naval or military affairs, and who wilfully communicates such information to any person to whom, in the interest of the state, it ought not to be communicated, is punishable in the same way. If any person commits any of the above-mentioned acts intending to communicate the information obtained, or entrusted to him, to a foreign state, he is

(a) 2 St. Bl. 539.

(b) *R. v. Thomas and Willett*, 33 L. J. (M.C.) 22; L. & C. 313; 9 L. T. 488; 12 W. R. 108; Warb. L. C. 77.

guilty of felony, and may be punished by penal servitude to the extent of life (*a*).

Any person inciting or counselling another to commit any of the above offences is guilty of a misdemeanor (*b*).

No prosecution can be commenced for these offences without the consent of the Attorney-General (*c*).

Other offences
against the
government
and sovereign.

A variety of other offences affecting the sovereign and government, and thence called *contempts* or *high misdemeanors*, might be noticed, but it will suffice here merely to mention them, referring for a fuller notice to Blackstone's Commentaries. Contempts against the sovereign's title, as the denial of his right to the crown; against his person and government, as drinking to the pious memory of a traitor; against his prerogative, as by disobeying his lawful commands; against his palaces or courts of justice, as by fighting in either; maladministration of high offices; embezzling the public money; selling public offices. These are generally punishable by fine and imprisonment, but are rarely made the subject of indictment, unless they fall within the province of some other crime.

Præmunire.

The subject of *Præmunire* may also be dismissed very summarily. The offence originally consisted in introducing a foreign power into the land, through obeying papal bulls and processes. The offender was put out of the king's laws and protection, his lands and goods were forfeited, and himself imprisoned during the king's pleasure. These penalties of præmunire were afterwards by different statutes applied to other great offences, some having no connection with the original crime, for example, to restrain the importation or making of gunpowder (*d*). But, some of the statutes having become obsolete and others having been repealed, prosecutions of this nature are never now heard of. The reader will find a discursive treatment of the subject in Blackstone, or his modern editors (*e*).

(*a*) 52 & 53 Vict. c. 52, ss. 1, 2.

(*b*) *Ibid.* s. 3.

(*d*) 16 Car. 1, c. 21.

(*c*) *Ibid.* s. 7.

(*e*) 4 Bl. 103; 4 St. Bl. 155.

CHAPTER III.

OFFENCES AGAINST RELIGION.

We do not propose to inquire fully into the grounds upon which the state has assumed to itself the right of punishing certain offences against religion. It is sufficient to say that it has been experienced that certain acts or courses of conduct which are forbidden by religion, are also productive of disorder and mischief to the community. These acts have therefore been declared illegal, and offenders are punishable, not for a breach of the law of God, as such, but for offending against the law of the country. That the state does not consider itself bound to enforce in every respect the obligations of morality, is obvious from the fact that mere lying and other acts of immorality are not within the pale of the criminal law.

Grounds on which the state punishes offences against religion.

APOSTACY—BLASPHEMY.

The punishment for apostacy, or the total *renunciation* of Christianity, was for a long period death. It was afterwards provided that if any one *educated in, or having made profession of*, the Christian religion, by writing, printing, teaching, or advised speaking, maintains that there are more Gods than one, or denies the Christian religion to be true, or the Holy Scripture to be of divine authority, he shall for the first offence be incapacitated for civil or military employment, and for the second offence, besides being incapable of bringing an action, or being guardian, executor, legatee, or grantee, he must suffer imprisonment for three years (a). There shall be no prosecution for

Apostacy.

(a) 9 & 10 Wm. 3, c. 32; in the Revised Statutes, c. 35.

such words spoken, unless information of such words be given on oath before a justice within four days after they are spoken, and the prosecution be within three months after such information (*a*). The offender for the first time is to be discharged from penalty, if, within four months after conviction, he renounces his error (*b*).

Blasphemy.

Blasphemy is also punishable at common law by fine and imprisonment. Christianity, as it is said, is a part of the law of England, and a gross outrage against it is to be punished by the state. The offences include not only blasphemous libels by one who has been attached to the Christian religion and has apostatized, as to which we have seen particular provisions have been made, but also the denying, whether orally or by writing, of the being or providence of the Almighty, contumelious reproaches of our Lord and Saviour Christ, profane scoffing at the Holy Scriptures, or exposing any part thereof to contempt or ridicule (*c*). But a blasphemous libel consists not in an honest questioning of the truths of the Christian religion, but in a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects (*d*). Publications which, in an indecent and malicious spirit, assail and asperse the truth of Christianity, or of the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, are properly regarded as blasphemous libels (*e*). But the disputes of learned men upon particular points of religion are not punished as blasphemy (*f*). It remains merely to add that the law is rarely put in force, and then only when the libel is of a most extravagant or outrageous nature.

DISTURBING PUBLIC WORSHIP.

Offences relating to public worship.

Any person wilfully and maliciously or contemptuously disturbing any lawful meeting of persons assembled for

(*a*) 9 & 10 Wm. 3, c. 32; in the Revised Statutes, c. 35, s. 2.

(*b*) *Ibid.* s. 3.

(*c*) v. 1 Russ. 613.

(*d*) *R. v. Ramsay*, 48 L. T. N. S. 74.

(*e*) *R. v. Bradlaugh*, 15 Cox, 217.

(*f*) For cases v. Arch. 897.

religious worship, or molesting the person officiating or any of those assembled, upon proof by two or more credible witnesses before a magistrate, must answer for such offence at the quarter sessions, and upon conviction is fined forty pounds (*a*). Riotous, violent, or indecent behaviour in a place of worship, otherwise called "brawling," is also punishable on summary conviction by a fine of five pounds or imprisonment for two months (*b*).

WITCHCRAFT, SORCERY, ETC.

Punishment (generally death) for these supposed evil practices belonged to a state of society different from ours. It is only about a century and a half, however, since an Act was passed to the effect that prosecutions for such practices should cease; at the same time making punishable by imprisonment persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in any occult or crafty science (*c*). By a later statute, persons telling fortunes or using any subtle craft, means, or device, by palmistry or otherwise to deceive Her Majesty's subjects, are dealt with in their true character, namely, as rogues and vagabonds, and are punishable by imprisonment with hard labour for three months (*d*). Witchcraft, &c.
Palmistry, &c.

Under this head may be noticed the case of Religious Impostors, who are punishable by fine and imprisonment.

Two offences dealt with by the magistrates may be noticed here briefly:

Profane Swearing is punishable on summary conviction by fine (*e*). Swearing.

Profanation of the Sabbath is an offence which has been brought into prominence through recent prosecutions. The statute of Charles II. provides that no Profanation of the Sabbath.

(*a*) 52 Geo. 3, c. 155, s. 12.

(*b*) v. 23 & 24 Vict. c. 32, s. 2. See also *post*, p. 185.

(*c*) 9 Geo. 2, c. 5.

(*d*) 5 Geo. 4, c. 83, s. 4.

(*e*) 19 Geo. 2, c. 21.

person may do any work of his *ordinary* calling upon the Lord's day, works of necessity and charity only excepted, under penalty of five shillings. Nor may any one expose to sale any wares, on penalty of forfeiting his goods; nor may drovers, &c., travel, under a penalty of twenty shillings (*a*). But no prosecution for such offence may be commenced without the consent of the chief officer of police of the district, or of two justices, or of the stipendiary magistrate (*b*).

Places of amusement, debate, &c., open on Sunday, admission to which is paid for, are to be deemed disorderly houses, and as such may be suppressed, and the keeper fined or imprisoned (*c*). The Crown is now, however, empowered to remit the penalties (*d*).

Heresy, and other acts no longer punishable criminally.

Certain practices which were at one time criminally punishable are now no longer so. *Heresy*, which consists not in a total denial of Christianity, but in an open denial of some of its principal doctrines as held by the Church has been again subjected only to ecclesiastical correction, *pro salute animæ* (*e*). Offences against the National Church which are either *negative*, that is, Non-conformity, or *positive*, by reviling its ordinances, &c. (*f*), though nominally liable to legal penalties, are never practically made the subjects of prosecution (*g*).

(*a*) 29 Car. 2, c. 7.

(*b*) 34 & 35 Vict. c. 87; the section making this Act temporary was repealed by 56 & 57 Vict. c. 54.

(*c*) 21 Geo. 3, c. 49, s. 1; v. *Terry v. The Brighton Aquarium Company*, L. R. 10 Q. B. 306; 44 L. J. (M.C.) 173; 32 L. J. N. S. 458.

(*d*) 38 & 39 Vict. c. 80.

(*e*) 29 Car. 2, c. 9; 4 Bl. 49.

(*f*) v. 1 Edw. 6, c. 1; 1 Eliz. c. 2.

(*g*) As to *Simony*, v. 2 St. Bl. 715.

CHAPTER IV.

OFFENCES AGAINST PUBLIC JUSTICE.

IN the first place we shall treat of that class of offences against public justice which consist in avoiding oneself, or assisting another to avoid, the punishments awarded by a court of justice.

Escape ; Breach of Prison ; Being at large during a term of Penal Servitude ; Rescue ; Obstructing Lawful Arrest.

ESCAPE.

The distinction between the first two and the fourth offences has been thus put :—Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape* ; where it is effected by the party himself with force, it is called *prison-breaking* ; where it is effected by others, with force, it is commonly termed a *rescue* (a). We have to consider the cases of delinquents in three positions : the prisoner who escapes ; the person who aids him ; those in whose custody he is, whether officers of the law or private individuals.

Escape, breach of prison, and rescue, distinguished.

If a prisoner escapes out of the custody of the constable, before he is imprisoned, he is punishable with fine and imprisonment (b).

Officers who, after an arrest, *negligently* allow a prisoner to escape, are punishable with a fine ; if they *voluntarily* permit it, they are deemed guilty of the

Escape from officers.

(a) 1 Russ. 889 ; 1 Hale, P. C. 590.

(b) 2 Hawk. c. 17. s. 5.

same offence, and are liable to the same punishment as the prisoner who escapes from their custody; and this whether the latter has been committed to gaol, or is only under bare arrest. But the officer cannot be thus punished for a felony until after the original offender has been convicted. Before the conviction, however, he may be fined and imprisoned as for a misdemeanor. The allowing the escape is punishable criminally only if the original imprisonment were for some criminal matter.

Escape from
private
persons.

Private individuals having persons lawfully in their custody, who *negligently* allow an escape, are punishable by fine or imprisonment, or both; *if voluntarily*, they are punishable as an officer would be under the same circumstances. Of course at any time they may deliver over the person in charge to an officer.

Aiding to
escape.

Aiding in the escape of a prisoner from a prison, other than a convict, military, or naval prison (*a*), or, with intent so to aid, conveying to him a mask, disguise, instrument, or any other thing, is a felony punishable with imprisonment to the extent of two years (*b*). Aiding a prisoner in custody for treason or felony to make his escape from prison, or from the constable or officer conveying him under a warrant to prison, is a felony punishable with penal servitude to the extent of seven years, or imprisonment with or without hard labour not exceeding two years (*c*). Aiding a prisoner of war to escape is a felony punishable with penal servitude for life, or imprisonment as above (*d*).

BREACH OF PRISON.

Breach of
prison.

The consequences of breach of prison vary according to the crime for which the prisoner is in custody. If he is in custody for treason or felony, the breach is also

(*a*) As to these see the statutes quoted in Arch. 918.

(*b*) 28 & 29 Vict. c. 126, s. 37.

(*c*) 16 Geo. 2, c. 31, s. 3; 54 & 55 Vict. c. 69, s. 1 (2).

(*d*) 52 Geo. 3, c. 156; 54 & 55 Vict. c. 69, s. 1 (2).

felony (a), and punishable by penal servitude to the extent of seven years, or by imprisonment not exceeding two years. If he is in custody for any other offence, the breach is a misdemeanor, and punishable by fine and imprisonment. There seems also to be this difference between the two cases—in the first, it must be proved that the prisoner escaped; in the second, this is not necessary.

To constitute this offence there must be an actual breaking, though it need not be intentional. Merely getting over the wall or the like is an escape only. It will be a sufficient defence to prove that the prisoner has been indicted for the original offence and acquitted; but unless he has been actually acquitted, or he can prove that no such offence was ever committed, it is not material whether the accused was guilty of the original offence or not.

“Prison” here includes any place where one is lawfully imprisoned, whether upon accusation or after conviction; for example, in the gaol or constable’s house.

BEING AT LARGE DURING TERM OF PENAL SERVITUDE.

Penal servitude was substituted for transportation in the year 1857(b); but the incidents of the latter attach to the former.

For a convict to be at large without lawful authority, ^{Escape from} which it lies on him to prove, before the expiration of ^{penal servi-} the term of transportation or penal servitude to which he was sentenced, is a felony punishable by penal servitude to the extent of life, and previous imprisonment not exceeding four years; or else by imprisonment not exceeding two years (c).

(a) 1 Edw. 2, st. 2, c. 1, in Revised Statutes 23 Edw. 1. *Stat. de frang. pris.*
 (b) 20 & 21 Vict. c. 3.
 (c) 5 Geo. 4, c. 84, s. 22; 4 & 5 Wm. 4, c. 67.

RESCUE.

Rescue.

Rescue is the forcibly and knowingly freeing another from arrest or imprisonment. If the original offender is convicted, the rescuer is guilty of the same offence as such original, whether it be treason, felony, or misdemeanor. If the rescuer is thus convicted of felony, the punishment is penal servitude to the extent of seven years, or imprisonment from one to three years (a); if of misdemeanor, fine or imprisonment, or both. If the original is not convicted, nevertheless the rescuer may be punished by fine and imprisonment as for a misdemeanor (b).

Rescuing or attempting to rescue a person convicted of murder, whilst proceeding to execution; or rescuing out of prison a person committed for or convicted of murder, is a felony punishable with penal servitude to the extent of life, or imprisonment not exceeding three years (c).

Rescuing or attempting to rescue an offender sentenced to penal servitude from a person charged with his removal, is a felony punishable in the same way as if the party rescued had been in gaol (d).

Poundbreach.

Another common law offence, somewhat of the same character, is poundbreach, that is, rescuing goods from the custody of the law after they have been impounded upon a distress. It is seldom, however, that a prosecution for poundbreach occurs (e), as the landlord is enabled by 2 Wm. & Mary, sess. 1, c. 5, to recover treble damages by a civil action. To rescue cattle distrained for *damage feasant*, is also a statutory offence punishable by a fine of £5 (f).

(a) 1 & 2 Geo. 4, c. 88, s. 1.

(b) 1 Hale, P. C. 598.

(c) 25 Geo. 2, c. 37, s. 9; 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(d) 5 Geo. 4, c. 84, s. 22.

(e) The most recent, and perhaps the only, reported case of the kind is *R. v. Butterfield*, 17 Cox, 598.

(f) 6 & 7 Vict. c. 30, s. 1.

OBSTRUCTING LAWFUL ARREST, ETC.

To prevent the execution of lawful process is at all times an offence, but more especially so when the object is to prevent the arrest of a criminal. It has been held that the party opposing such an arrest becomes thereby *particeps criminis*, that is, an accessory in felony, and in treason and misdemeanors a principal (a). The statutes abolishing so-called sanctuaries or privileged places make opposition to arrest in those places a felony. Obstructing
lawful arrest.

An assault upon, resistance to, or wilful obstruction of, a peace officer in the execution of his duty, or any person acting in his aid, or an assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the person assaulting or of any other person for any offence, is a misdemeanor, punishable with imprisonment to the extent of two years (b). Wounding, doing grievous bodily harm to, shooting at, or attempting to shoot at, any person with such intent is punishable with penal servitude to the extent of life (c).

In cases where a coroner has jurisdiction to hold an inquest, it is a misdemeanor to destroy the dead body, or otherwise to prevent the holding of an intended inquest upon it, and to do so amounts to an obstruction of an officer in the discharge of his duty (d).

Not only positively obstructing an officer, but also refusing to aid him in the execution of his duty in order to preserve the peace, is a crime. This offence is a misdemeanor at common law (e); but the prosecution must show that a breach of the peace was at the time being committed in the presence of the constable and Refusing to aid
an officer.

(a) 2 Hawk. c. 17, s. 1.

(b) 24 & 25 Vict. c. 100, s. 38.

(c) *Ibid.* s. 18.

(d) *R. v. Stephenson*, L. R. 13 Q. B. D. 331; 53 L. J. (M.C.) 176; 52 L. T. 267; 33 W. R. 244; Warb. L. C. 118.

(e) *v. R. v. Sherlock*, L. R. 1 C. C. R. 20; 35 L. J. (M.C.) 92; 13 L. T. 643; 14 W. R. 288; Warb. L. C. 52.

that there was a reasonable necessity for him to call on the defendant to render him assistance (a).

PERJURY.

Definition.

The crime committed by one who, when a *lawful oath* is administered to him in some proceeding in a court of justice of competent jurisdiction, swears *wilfully, absolutely, and falsely* in a matter material to the issue or point in question (b).

False oaths not amounting to perjury.

Such is the definition of perjury at common law. The qualification with which it must be taken will appear below. Certain other false oaths are attended by the punishments of perjury, though they are not known by that name. And whenever an Act of Parliament requires an oath to be taken, but does not make it perjury to take a false oath, the taking of such an oath, though not strictly speaking perjury, is a misdemeanor; for example, an affidavit made for the purpose of filing a bill of sale (c).

False affirmations.

It may be necessary to remind the reader that the false affirmation of any person who is by law authorised to make an affirmation or declaration in lieu of an oath, is on the same footing, and visited with the same consequences as perjury (d).

Nature of the oath.

The nature of the oath must first be considered; a lawful oath taken in a judicial proceeding, administered within the authority of the tribunal, &c., administering. As a rule it must be taken in a court of justice, but there are apparent exceptions; for example, it has been held perjury for a clergyman to take a false oath against simony at the time of his institution (e). It is immaterial whether the oath be taken in the face of the court or out of it by a person authorised to administer oaths in matters depending in it, as in the case of affidavits; or

(a) *R. v. Brown*, C. & M. 314.

(b) 3 Inst. 164; v. *R. v. Aylett*, 1 T. R. 69.

(c) *R. v. Hodgkiss*, L. R. 1 C. C. R. 212.

(d) v. pp. 74, 399.

(e) *R. v. Lewis*, 1 Str. 70.

whether it be taken in relation to the merits of the cause, or in a collateral matter, for example, on inquiring into the sufficiency of bail. The oath must be taken before a person who has *jurisdiction* of the cause, and lawful authority to administer the oath. Thus, in the case of a trial taking place where the court has no jurisdiction, a witness cannot be indicted for perjury thereat. Nor can a conviction for perjury be sustained against a witness, who, although duly sworn before a competent authority, has given the answers upon which perjury is assigned, in the absence of any such authority (a). Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having, by law or by consent of parties, authority to hear, receive, and examine evidence, is empowered to administer an oath to all witnesses legally called (b).

The oath must be taken *falsely, wilfully, and absolutely*; "falsely" refers to the taking of the oath, not to the truth of what is sworn. It is immaterial whether the fact which is sworn be in itself true or false. The question is, Did the defendant believe what he said to be true? If not, he is guilty of perjury. It is not necessary that he should know that it was untrue; for he will be guilty if he swears to the truth, not knowing anything about the matter; much more if he swears to the truth, thinking what he swears is untrue. In other words, he is guilty if his intention can be proved to be to deceive. Thus he will not be innocent, though he swears that he only *believes* such and such to be the case, if he knows it to be not so, though, of course, it will be more difficult in such cases to establish the guilt of the defendant (c). As we have just seen, the answer must be given intentionally or wilfully; it also must be given with some degree of deliberation. Mere inadvertence or mistake will not support the charge, as if the witness is

The taking of the oath.

(a) *R. v. Lloyd*, L. R. 19 Q. B. D. 213; 56 L. J. (M.C.) 199; 56 L. T. N. S. 750; 35 W. R. 653.

(b) 14 & 15 Vict. c. 99, s. 16.

(c) *R. v. Pedley*, 1 Leach, 327.

bewildered on cross-examination. Prevarication, though the actual words used are true, will not shield the defendant; as when a witness assured the court that a man could not live for two hours longer if he went on as he (the witness) left him; the fact being that at the time he was very well, but had got a bottle of gin to his mouth (a).

Materiality of the oath.

The matter sworn to must be *material* to the cause depending in the court. If the matter is wholly foreign to the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot be perjury (b). Thus, if on a trial to determine whether a person is sane or not, a witness introduces his evidence by giving an account of a journey which he took to see the party, and swears falsely in relation to some of the circumstances of the journey, this is not sufficient to support an indictment for perjury. But all false statements as to matters which affect the credit of a witness are considered material (c).

Acts not amounting to perjury.

It is not necessary to constitute perjury that the false oath be believed by the court before which it is taken, or that any person be damaged by it; for the prosecution is grounded, not on the damage to the party, but on the abuse of public justice. A false verdict is not regarded as perjury, because it is said the jurors do not swear to depose to the truth, but only to judge of the deposition of others (d). So the breaking of their oaths by interpreters, officers in charge of the jury, &c., does not amount to perjury; inasmuch as it is an essential of perjury that the accused has been sworn to depose to the truth.

Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved (e).

(a) *Gilb. Ev. by Lofft*, 662.

(c) *R. v. Baker*, L. R. [1895].

(d) 1 *Russ.* 320.

(b) 1 *Hawk. c.* 69, s. 8; 1 *Russ.* 307, 308.

1 *Q. B.* 797; 64 *L. J. (M.C.)* 177.

(e) *R. v. Rhodes*, 2 *Lord Raym.* 886.

Perjury is one of the offences included in the Vexatious Procedure. Indictments Act; and, therefore, no bill of indictment can be presented to or found by the grand jury unless one of the preliminary steps indicated in the Act has been taken (a).

Any judge (b) may direct the prosecution of a person who appears to have been guilty of perjury in his evidence given before him, and may commit the accused to gaol unless he gives sufficient security for his appearance at the assizes (c).

It is a well known rule that the testimony of a single witness is not sufficient to convict on a charge of perjury. Two witnesses must contradict what the accused has sworn; or, at least, one must so contradict, and other evidence must materially corroborate that contradiction (d). But this rule does not apply when the perjury consists in the defendant's having contradicted what he swore on a former occasion; in this case the testimony of a single witness in support of the defendant's own original statement will suffice (e). The reason usually assigned for the rule is, that if one witness were allowed to suffice to prove perjury, it would only be oath against oath. But other considerations, such as the great necessity for the protection of witnesses, also have weight.

There must be two witnesses in perjury.

Perjury is a misdemeanor. The punishment is penal servitude to the extent of seven years, or imprisonment to the same extent (f).

(a) v. p. 350.

(b) As to who are comprised in this term, see the Act.

(c) 14 & 15 Vict. c. 100, s. 19.

(d) v. *R. v. Boulter*, 21 L. J. (M.C.) 57; 5 Cox, 543. *R. v. Braithwaite*, 1 F. & F. 638.

(e) *R. v. Knill*, 5 B. & Ald. 929, n.

(f) 2 Geo. 2, c. 25, s. 2; 20 & 21 Vict. c. 3. In cases where another's life is wilfully "sworn away" by a perjurer, it is hard to see why the latter should not be regarded as guilty of murder. The punishment for the crime is by no means excessive. It is one of the most dangerous and probably the most frequently committed of all crimes, but in proportion to the frequency of its occurrence it is perhaps the one which most seldom receives punishment.

SUBORNATION OF PERJURY.

Subornation.

The procuring another to take such a false oath as would constitute perjury in the principal (*a*). The offence does not amount to subornation if that other does not actually take the false oath; but it is nevertheless punishable (*b*).

The punishment for subornation is the same as for perjury itself; and the same course has to be taken under the Vexatious Indictments Act.

VOLUNTARY OATHS.

Administering or taking voluntary oaths.

It will be remembered that in a former chapter (*c*) it was shown that administering or taking certain oaths was illegal and an offence against Government. This section deals with quite another matter. The evil to be guarded against in this case is the misuse of a valuable engine of the law, and the consequent weakening of its effect when resorted to on proper occasions.

It is unlawful for a justice of the peace or other person to administer or receive, or cause or allow to be administered or received, any oath, affidavit, or solemn affirmation touching any matter whereof he has not jurisdiction or cognizance by some statute in force (*d*). The offence is a misdemeanor, punishable by fine or imprisonment, or both. The administering, &c., is punishable, although the person did not act wilfully in contravention of the statute, but only inadvertently (*e*).

FALSE DECLARATIONS.

Statutes punishing false declarations.

A great number of statutes declare punishable false declarations with regard to the subjects with which such

(*a*) 4 Bl. 138.

(*b*) 1 Hawk. c. 69, s. 10.

(*c*) v. p. 47.

(*d*) 5 & 6 Wm. 4, c. 62, s. 13.

(*e*) *R. v. Nott*, 12 L. J. (M.C.), 143.

statutes deal. We will merely mention a few of the chief (a) :

Parliamentary elections: 6 Vict. c. 18, s. 81 ; 35 & 36 Vict. 33 ; 46 & 47 Vict. c. 51, s. 33.

Municipal elections: 35 & 36 Vict. c. 33 ; 41 & 42 Vict. c. 26, s. 25.

In Bankruptcy matters: 32 & 33 Vict. c. 62, s. 14.

In matters relating to the customs, &c. : 39 & 40 Vict. c. 36, s. 168.

A County Court bailiff indorsing a false memorandum of service of process: 51 & 52 Vict. c. 43, s. 78.

Before Registrars as to Births, Marriages, or Deaths: 6 & 7 Wm. 4, c. 86, s. 41 ; 37 & 38 Vict. c. 88, ss. 40, 46.

Before Magistrates: 5 & 6 Wm. 4, c. 62, s. 18.

BRIBERY.

The corrupt treatment of one intrusted with a public charge, to influence him in the discharge of his duty in that character.

The offence, which may be thus generally defined, comprises acts differing considerably from each other. They may be divided into two classes ;

1. Where some person concerned in the administration of public justice (b) is approached by one bringing him a reward, in order to influence his conduct in his office.

2. Where some person having it in his power to procure, or aid in procuring, for another a public place or appointment, is so approached (c).

(a) A full list will be found with more detailed treatment in Rosc. 463.

(b) v. *infra*, as to ministerial officers.

(c) v. 1 Hawk. c. 67, ss. 1-3.

Bribery to
influence con-
duct of one in
office.

1. The offence of *offering* to, or *receiving* by, an officer, judicial or ministerial (*a*), an undue reward to influence his behaviour in his office is a misdemeanor punishable by fine and imprisonment. Both the giver and the taker are guilty. And though the reward be refused, the offerer is equally punishable for the attempt. The offence is not restricted to the case of influencing the higher officers, such as judges or members of the Government; but extends to those in a subordinate position, for example, constables, as if one bribe a constable to refrain from executing a warrant (*b*). A particular species of bribery, viz., corruptly influencing jurymen, will be treated of hereafter under the title Embracery (*c*).

Bribery to pro-
cure place, &c.

2. For the case of convenience we may distinguish two varieties of this offence :

i. When the place or appointment is in the gift of some public officer.

ii. When it is determined by public election.

i. This offence may also be regarded as falling under the first class, (1) inasmuch as the presentation to the place by the public officer is one of the duties of his office. The offence is a misdemeanor. Thus the attempt to procure an appointment by offering a sum of money to a cabinet minister was punished as a misdemeanor (*d*).

Consequences
of trafficking
in public
offices.

By particular statutes it has also been provided that persons selling public offices shall lose all right to the appointment, and the buyers shall not only be rejected, but also be disabled from ever holding such office (*e*). Those buying or selling, or receiving or paying money or rewards for offices, are guilty of a misdemeanor (*f*). So also are persons who do not thus directly buy or sell,

(*a*) The text-books, in general, confine the offence of bribery to a bribery of judicial officers; but this definition of the offence seems too narrow. Arch. 949.

(*b*) 3 Inst. 187.

(*c*) v. p. 82.

(*d*) *R. v. Vaughan*, 4 Burr. 2494.

(*e*) 5 & 6 Edw. 6, c. 16, s. 1; 49 Geo. 3, c. 126, s. 1.

(*f*) 49 Geo. 3, c. 126, s. 3.

but who pay money for soliciting or obtaining offices, or any negotiations or pretended negotiations relating thereto (*a*). Certain other offences in connection with the traffic in offices (*b*) are dealt with ; and certain exceptions are made, for example, the sale of commissions in the army (*c*).

ii. Bribery at elections.

As to *parliamentary* elections.—The law on this subject was contained chiefly in the Corrupt Practices Prevention Act, 1854 (*d*), amended by later statutes, which to the extent mentioned below are repealed by the Corrupt and Illegal Practices Prevention Act, 1883 (*e*). This Act and the Corrupt Practices Prevention Acts (*f*), that is, the unrepealed parts of them, are to be cited together as the Corrupt Practices Prevention Acts, 1854 to 1883 and, with the Corrupt and Illegal Practices Prevention Act, 1895 (*g*), contain the law on the subject.

Bribery at
parliamentary
elections.

The offences declared to be bribery on the part of the *candidate* or his agents are the following :

On the part of
the candidate.

(*a*) To, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend ; or offer, promise, or promise to procure or endeavour to procure, any *money*, or *valuable consideration* (*h*), to or for any voter, or other person in order to induce any voter to vote, or refrain from voting, or to corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any

(*a*) 49 Geo. 3, c. 126, s. 4.

(*b*) As to what offices are within the statute, v. 1 Russ. 435.

(*c*) The force of this exception was taken away by the Royal Warrant of July 1871, abolishing purchase. v. 34 & 35 Vict. c. 86.

(*d*) 17 & 18 Vict. c. 102, amended by 21 & 22 Vict. c. 87 ; 26 & 27 Vict. c. 29 ; 30 & 31 Vict. c. 102, s. 49 ; 31 & 32 Vict. c. 125, ss. 43-47. As to these Acts, the Corrupt Practices Act of 1883 has repealed the following, viz. : ss. 1, 4, 5, 6, 9, 14, 23, 36, 39, and parts of 2, 3, 7, and 38 of the first of these Acts ; the whole of the second, the whole of the third except s. 6, part of s. 34 of the fourth, and ss. 43, 45, 46, and 47 of the fifth.

(*e*) 46 & 47 Vict. c. 51.

(*f*) 17 & 18 Vict. c. 102 ; 26 & 27 Vict. c. 29 ; 31 & 32 Vict. c. 125 ; 35 & 36 Vict. c. 33 ; 42 & 43 Vict. c. 75.

(*g*) 58 & 59 Vict. c. 40.

(*h*) 17 & 18 Vict. c. 102, ss. 2 and 3.

election. An offer to pay rates, &c., has been since included in this offence (a).

(b). To give, &c., any *office, place, or employment*, under the same circumstances (b).

(c). To do any of the things mentioned above, in order to induce the person benefited to procure, or endeavour to procure, the return of any person, or any vote (c).

(d). The act of the person so procuring, &c. (d).

(e). To pay, &c., money, with the intent that it shall be expended in bribery; or knowingly to pay it in discharge of what has been so expended (e).

“Corrupt practice.”

There are other offences known as treating and using undue influence, of which not only the candidate and his agents but any other person may be guilty, and these, together with bribery and procuring personation, are comprised in the term “corrupt practice” (f).

Treating is defined to be providing any meat, drink, entertainment or provision to any person, for the purpose of corruptly influencing him to give or refrain from giving his vote at the election (g).

Undue influence is defined to be the use of or threats to use any force, violence, or restraint, or to inflict or threaten any temporal or spiritual injury or loss upon any person in order to induce or compel him to vote or refrain from voting, or by duress or any fraudulent device to impede the free exercise of the franchise of any elector (h).

Any voter who allows himself to be bribed or treated is also guilty of a “corrupt practice.”

The commission of any “corrupt practice” other than

(a) 30 & 31 Vict. c. 102, s. 49.

(c) 17 & 18 Vict. c. 102, s. 2.

(e) *Ibid.*

(g) 46 & 47 Vict. c. 51, s. 1.

(b) 17 & 18 Vict. c. 102, s. 2.

(d) *Ibid.*

(f) 46 & 47 Vict. c. 51, ss. 1-3.

(h) *Ibid.* s. 2.

personation, or procuring personation, is a misdemeanor. ^{Punishment for "corrupt practices."}
 The punishment is imprisonment for one year, or a fine not exceeding £200.

Personation, or procuring personation, is a felony, and is punishable by imprisonment with hard labour for two years (a).

By the same statute certain acts are declared to be "illegal practices." These are: ^{"Illegal practices."}

1. To make a payment, or contract for payment, for the purpose of promoting the election of a candidate, either :
 - (a). For the conveyance of electors to or from the poll.
 - (b). To an elector (unless he is an advertising agent) for the use of any premises for the exhibition of any address, bill, or notice.
 - (c). For any committee-room in excess of the number allowed.

The person who receives any such payment is also guilty of an illegal practice.

2. To incur expense in excess of the maximum allowed by the Act.
3. To vote, or induce a person to vote, knowing that the person voting is prohibited from doing so.
4. Publishing knowingly a false statement of the withdrawal of a candidate for the purpose of promoting the return of another candidate.
5. Corruptly inducing any person to withdraw from being a candidate, the person who so withdraws being also guilty.
6. Paying money for bands of music, &c., or for

(a) 46 & 47 Vict. c. 51, s. 6.

cockades, or other marks of distinction, or receiving any such payment.

7. Employing any person for payment for any purpose other than those mentioned in the first schedule to the Act, the person employed being also guilty.
8. Printing, &c., any bill referring to the election without adding the name and address of the printer and publisher.
9. Using as a committee-room any premises on which intoxicating liquor is sold (other than a permanent club), or an elementary school.
10. Paying any expenses of an election otherwise than through the candidate's election agent.

Certain irregularities by election agents with regard to their accounts are also included in the list of illegal practices.

By the Corrupt and Illegal Practices Prevention Act, 1895 (a), a person who, for the purpose of affecting the return of a candidate, makes any false statement of fact as to the personal conduct or character of such candidate is declared to be guilty of an illegal practice within the meaning of the Act of 1883, unless he can show that he believed on reasonable grounds that his statement was true.

Punishment
for "illegal
practices."

The commission of an "illegal practice" is punishable on summary conviction by a fine not exceeding £100 (b).

A corrupt agreement to withdraw an election petition is a misdemeanor punishable by imprisonment for twelve months and a fine of £200 (c).

Proceedings for the above offences must be commenced

(a) 58 & 59 Vict. c. 40, s. 1.

(b) 46 & 47 Vict. c. 51, s. 10.

(c) 46 & 47 Vict. c. 51, s. 41.

within a year from the time of the offence committed, or within three months after the report by Election Commissioners is made where an inquiry is held under the Act (a).

Certain disqualifications also attach to candidates and others who have been found guilty of bribery, corrupt practices, &c., as to which reference may be made to the Act of 1883. Disqualifications attaching to those guilty of bribery, &c.

By 30 & 31 Vict. c. 102, s. 11, no elector who has within six months before an election been employed by any candidate as election agent, canvasser, &c., shall be entitled to vote at that election, and if he does so vote he is guilty of a misdemeanor.

The Ballot Act, 1872 (b), sec. 3, declares it to be a misdemeanor to forge or tamper with a ballot paper. The punishment in the case of an election officer or clerk is imprisonment for two years, and in the case of any other person imprisonment for six months.

As to *municipal* elections.—Any person who is guilty of a “corrupt practice” at such an election is liable to the like actions, prosecutions, penalties, forfeiture, and punishments, as if the corrupt practice had been committed at a parliamentary election. The law as to “illegal practices” is also substantially the same as in the case of parliamentary elections (c). Municipal elections.

While dealing with the subject of bribery it may be convenient to refer to the offering of bribes to three other classes of persons, although in their case the offence is not against public justice.

Offering or promising a bribe to an officer of customs to induce him to neglect his duty is punishable by a fine of £200, and if the bribe is accepted the officer is liable to a fine of £500 (d). Custom-house officers.

(a) 46 & 47 Vict. c. 51, s. 51.
(c) v. 47 & 48 Vict. c. 70.

(b) 35 & 36 Vict. c. 33.
(d) 39 & 40 Vict. c. 36, s. 217.

Excise officers. There is a similar provision with regard to excise officers, but both the briber and the bribed are liable to penalties of £500 (a).

Bribery of members, officers, &c., of a public body.

By a recent statute (b), every person who solicits or receives any gift or reward for himself or on account of any member, officer, or servant of a public body (including a County or Town Council, Vestry, and certain other bodies defined by the Act), to induce him to do or forbear from doing anything in respect of any transaction in which the public body is concerned, and also any person offering or paying any gift or reward for such a purpose, is declared to be guilty of a misdemeanor. The punishment is imprisonment for two years, or a fine of £500, and an offender who has received a bribe may be ordered to pay it over to the public body. He may also be adjudged to forfeit any public office held by him at the date of his conviction, and to be incapable of holding a public office for seven years. Upon a second conviction for a like offence he may be subjected to further disabilities. The consent of the Attorney-General is required before a prosecution can be commenced under this Act.

EMBRACERY, ETC.

Embracery.

Embracery is an attempt to influence a jury corruptly to give a verdict in favour of one side or party, by promises, persuasions, entreaties, money, entertainments, or the like. A jurymen himself may be guilty of this offence by corruptly endeavouring to bring over his fellows to his view. The offence is a misdemeanor, both in the person making the attempt, and also in those of the jury who consent. The punishment—both at common law and by statute—is fine and imprisonment (c).

Other offences

There are certain other acts interfering with the free

(a) 7 & 8 Geo. 4, c. 53, s. 12.
(c) 6 Geo. 4, c. 50, s. 61.

(b) 52 & 53 Vict. c. 69.

administration of justice at a trial, which are considered as high misprisions and contempts, and are punishable by fine and imprisonment. Such are the following : ^{preventing a fair trial.}

Intimidating the parties or witnesses.

Endeavouring to dissuade a witness from giving evidence, though it be without success.

Concocting or tampering with materials intended to be used as evidence before a judicial tribunal for the purpose of misleading that tribunal (*a*).

Advising a prisoner to stand mute, *i.e.*, not to plead.

Assaulting or threatening an opponent for suing him ; a counsel or attorney for being employed against him ; a juror for his verdict ; a gaoler or other ministerial officer for what he does in the discharge of his duty.

For one of the grand jury to disclose to the prisoner the evidence against him.

By 55 & 56 Vict. c. 64, to threaten or injure a person on account of his evidence given before a Royal Commission, or a Parliamentary Committee, or on any inquiry held by statutory authority, is a misdemeanor punishable by a fine of £100, or imprisonment for three months.

There are three offences, somewhat liable to confusion, which consist in an unlawful interference in another's suit, or in stirring up such suits :—

Common Barratry ; Maintenance ; Champerty.

COMMON BARRATRY.

The offence of *frequently* inciting and stirring up suits and quarrels between Her Majesty's subjects, either at law or otherwise (*b*). It is insufficient to prove a single act, inasmuch as it is of the essence of the offence that ^{Common barratry.}

(*a*) *R. v. Vreones*, L. R. [1891], 1 Q. B. 360 ; 60 L. J. (M.C.) 62.

(*b*) 4 Bl. 260.

the offender should be a *common* barrator. Moreover it is no crime for a man frequently to bring actions in his own right, though he be unsuccessful.

The offence is a misdemeanor, punishable by fine and imprisonment. If the offender is connected with the legal profession, he is disabled from practising for the future. If, having been convicted of this offence, he afterwards practises, the court may inquire into the matter in a summary way; and on the subsequent practising being proved, the offender may be sentenced to penal servitude to the extent of seven years (*a*).

Suing in name
of fictitious
plaintiff.

Another offence of a like nature may be noticed, namely, suing in the name of a fictitious plaintiff. If committed in the superior courts it is a high contempt, punishable at their discretion. If in the inferior courts, it is punished by imprisonment for six months, and treble damages to the person injured (*b*).

MAINTENANCE.

Maintenance.

The officious intermeddling in a suit that in no way belongs to one, by *maintaining* or assisting either party, with money or otherwise, to prosecute or defend it (*c*). It is a misdemeanor punishable by fine and imprisonment (*d*).

It has been declared to be maintenance to bear the whole or part of the expenses of the suit for another, or to retain a solicitor or counsel for him, but the offence is not committed by assisting another person in a criminal prosecution or in his defence to a prosecution (*e*). And

(*a*) 12 Geo. I, c. 29, s. 4, made perpetual.

(*b*) 8 Eliz. c. 2.

(*c*) 1 Hawk. c. 83, s. 23; v. also *Bradlaugh v. Newdegate*, L. R. 11 Q. B. D. 1; 52 L. J. (Q. B. D.) 454.

(*d*) This maintenance is sometimes termed *curialis*, to distinguish it from another species—*ruralis*, which latter consists in assisting another to his pretensions to lands, or holding them for him by force or subtlety, or stirring up quarrels or suits in the county, in relation to matters wherein he is no way concerned. (Bac. Abr.) This seems to approach the crime of barratry.

(*e*) *Grant v. Thompson*, 18 Cox. C. C. 100; 72 L. T. 264; 43 W. R. 446.

acts of this kind are justifiable when one has an interest in the thing in variance, as that of a reversioner; of kindred or affinity; of other relations, *e.g.*, landlord and tenant, master and servant; of charity, *e.g.*, to enable a poor man to carry on his suit; of the profession of law, *e.g.*, to act as counsel or solicitor. And it may be said generally, that the courts would be reluctant at the present day to punish an act of this kind criminally, unless some improper motive were manifestly present. This remark also applies to the next offence.

CHAMPERTY.

Champerty is a species of maintenance. The distinguishing feature is, that the bargain is made with the plaintiff or defendant *campum partire*, that is, in the event of success to divide the land or other subject-matter of the suit with the champertor in consideration of his carrying on the party's suit at his own expense. Thus it has been held punishable as champerty to communicate such information as will enable a party to recover a sum of money by action, and to exert influence in procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered (*a*). Champerty.

COMPOUNDING OFFENCES.

A private individual is not obliged to set the law in motion for the prosecution of a criminal, though, as we shall see, he is punishable for the concealment of treason or felony (*b*). Thus, merely to forbear to prosecute is no offence; there is wanting something else to constitute a crime, and this essential is the taking some reward or advantage. Mere forbearance to prosecute, no crime.

Under this title we shall treat of compounding (*a*) felonies; (*b*) misdemeanors; (*c*) informations on penal statutes; noticing also the offence of taking rewards for helping to recover stolen goods.

(*a*) *Stanley v. Jones*, 7 Bing. 369.

(*b*) *v.* pp. 44, 88.

Compounding
felony.

(a) *Compounding felony*, or forbearing to prosecute a felon on account of some reward received, is a misdemeanor at common law, punishable by fine and imprisonment. The offence of compounding a felony is complete at the time when the agreement to abstain from prosecuting is made; it is not necessary, therefore, in an indictment for such an offence, to allege that the prisoner did abstain from prosecuting, and that by reason of such abstention the thief escaped prosecution (a). The offence is not confined to the owners of stolen property entering into such agreements; any person, therefore, who having knowledge that a felony has been committed, receives a reward upon his agreeing to abstain from prosecuting, is guilty of this offence (b). Of course the reward need not be of a monetary nature, but may be any advantage proceeding from or on behalf of the felon and accruing to the person who forbears. The most common form of this crime is what was anciently known as *theft-bote*, that is, the forbearing to prosecute a thief, on consideration of receiving one's stolen goods back again, or other advantage. But the mere taking back stolen goods, without agreeing to show any favour to the thief, is no crime. If, after the compounding the compounder nevertheless prosecuted the felon to conviction, the judge would direct an acquittal for the compounding (c).

Taking reward
for return of
stolen property, &c.

To corruptly take any reward for helping a person to property stolen or obtained, &c., by any felony or misdemeanor (unless all due diligence to bring the offender to trial has been used), is felony punishable by penal servitude to the extent of seven years (d). An advertisement offering a reward for the return of stolen or lost property, using words purporting that no questions will be asked, or seizure or inquiry made after the person producing the property, or that return will be made to any pawnbroker or other person who has bought or made advances on such

(a) *R. v. Burgess*, L. R. 16 Q. B. D. 141; 55 L. J. (M.C.) 97; 53 L. T. N. S. 919; 33 W. R. 306. Warb. L. C. 65.

(b) *Ibid.*

(c) *R. v. Stone*, 4 C. & P. 379.

(d) 24 & 25 Vict. c. 96, s. 101.

property of the amount paid for or lent on the same—renders the advertiser, printer, and publisher liable to forfeit £50 each to any person who will first sue for it (a). But an action cannot be brought to recover the forfeiture from the printer or publisher except within six months after the forfeiture is incurred; nor at all without the consent of the Attorney- or Solicitor-General (b).

(b) *Compounding misdemeanors* is illegal, as impeding the course of public justice. But, *after conviction*, if the misdemeanor principally and more immediately affects an individual (such as one for which he might sue and recover damages in a civil action), as a battery, imprisonment, or the like, the court sometimes permits the defendant to *speak with the prosecutor*, before any judgment is pronounced; and if the prosecutor declares himself satisfied, inflicts but a trivial punishment. But this will not be allowed if the offence is of a more public nature (c).

(c) *Compounding informations upon penal statutes*.—Compounding informations upon penal statutes. In order to promote the discovery and punishment of crime, many statutes imposing a pecuniary penalty on the offender award the penalty, either in part or in whole, to any person who prosecutes, hence termed a *common informer*. It is clearly a gross abuse of this arrangement, not only tending to the escape of offenders but also encouraging malicious threats of proceedings, for a person to take a reward on condition that he do not act as an informer. Accordingly it has been enacted that if any informer makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, he forfeits £10, and is liable to such imprisonment and further fine as the court shall award, and is for ever disabled from suing on any popular or penal statute (d). A person may be thus convicted of taking a reward for forbearing to prosecute, although no

(a) 24 & 25 Vict. c. 96, s. 102.

(b) 33 & 34 Vict. c. 65, s. 3.

(c) *v. Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371; and *Windhill Local Board v. Vint*, L. R. 45 Ch. D. 351.

(d) 18 Eliz. c. 5; 56 Geo. 3, c. 138, s. 2.

offence liable to a penalty has been committed by the person from whom the money is taken (*a*). The Act does not, however, apply where the penalties compounded for are only recoverable before justices (*b*).

MISPRISION OF FELONY.

Misprision of felony.

Misprision of felony is the concealment of some felony (other than treason (*c*)) committed by another. There must be knowledge of the offence merely, without any assent; for if a man assent he will either be a principal or an accessory. Thus one will be guilty of misprision who sees a felony committed, and takes no steps to secure the apprehension of the offender. The offence is a misdemeanor, punishable by fine and imprisonment.

CRIMINAL DEALINGS WITH RECORDS.

Records: stealing, forging, &c.

Certain offences with regard to public records and documents are severely punished. They chiefly fall under the heads of "Larceny" and "Forgery." A mere enumeration of the chief of these offences will suffice here, fuller particulars being given under the titles referred to above:

Stealing, injuring, &c., records, &c.: 24 & 25 Vict. c. 96, s. 30 (*d*).

Forging, &c., records, &c.: 24 & 25 Vict. c. 98, ss. 27-31 (*e*).

For an *employé* in the Record Office to certify a writing as a true copy of a record knowing it to be false, is felony punishable by penal servitude to the extent of life, or imprisonment from two to four years (*f*).

(*a*) *R. v. Best*, 9 C. & P. 368. (*b*) *R. v. Crisp*, 1 B. & Ald. 282.
 (*c*) Misprision of Treason, v. p. 44. (*d*) v. p. 195. (*e*) v. p. 258.
 (*f*) 1 & 2 Vict. c. 94, s. 19. See also Evidence Amendment Act, 14 & 15 Vict. c. 99. For a full list of offences of the nature of forgeries of records, v. Arch. 691.

EXTORTION AND OTHER MISCONDUCT OF PUBLIC OFFICERS.

Every malfeasance, or culpable non-feasance of an officer of justice, with relation to his office, is a misdemeanor at common law punishable by fine or imprisonment, or both. Forfeiture of his office, if a profitable one, will also generally ensue. Under the term "officers of justice" are included not only the higher officers, as judges, sheriffs, but also those of a lower rank, as constable, overseers, &c. Misconduct in office.

As to *malfeasance* (a).—In cases of oppression and partiality the officers are clearly punishable: and not only when they act from corrupt motives, but even when this element is wanting, if the act is clearly illegal (b), for example, for a magistrate to commit in a case in which he knows he has no jurisdiction. The proceedings will generally be by impeachment, or information in the Queen's Bench, according to the rank of the offender; but an indictment will also lie. Malfeasance.

Extortion, in the more strict sense of the word, consists in an officer unlawfully taking, by colour of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due (c). But it is not criminal to take a reward, voluntarily given, and which has been usual in the case, for the more diligent or more expeditious performance of his duty. Extortion.

As to *non-feasance*.—An officer is equally liable for neglect of his duty as for active misconduct. Thus an overseer is indictable for not providing for the poor (d). A refusal by any person to serve an office to which he has been duly appointed, and from which he has no ground of exemption, is an indictable offence. Non-feasance.

There are special statutory provisions with regard Sheriffs and their officers.

(a) As to Bribery, v. p. 75.
(c) 4 St. Bl. 252.

(b) *R. v. Sainsbury*, 4 T. R. 451.
(d) v. also 11 Geo. I, c. 4.

to sheriffs and their officers. If such a person conceals a felon or refuses to arrest him in his bailiwick, or releases a prisoner who is not bailable, or is guilty of certain other offences against the Sheriff's Act 1887 (*a*) he commits a misdemeanor, and is liable to imprisonment for a year, and may be fined. If he withholds a prisoner bailable after he has offered sufficient security, or takes or demands any money, other than the fees he is allowed by Act of Parliament (*b*), or grants a warrant for execution of any writ before he has received the writ, or is guilty of a breach of the provisions of the Act, or of any wrongful neglect in the execution of his office, or of any contempt of a superior court, he may be punished as for contempt of court, and be compelled to forfeit £200, and to pay all damage suffered by the party aggrieved (*c*).

CONTEMPT OF COURT.

Contempt of court.

A contempt of court is a disobedience to the rules, orders, or process, or a disregard of the dignity of a court of law. All such contempts are punishable by indictment (*d*), but if committed against a court of *record*, that court has, in most cases, power to fine and imprison the offender in a summary way (*e*). It does not fall within the purview of this work to treat of the latter mode of procedure, which is now the usual way of dealing with this class of offence. The remedy by indictment, however, still remains (*f*).

(*a*) 50 & 51 Vict. c. 55, s. 29, sub-s. 1.

(*b*) This does not apply to overcharges made by mistake, *Lee v. Dangar, Grant & Co.*, L. R. [1892], 2 Q. B. 337.

(*c*) 50 & 51 Vict. c. 55, s. 29, sub-s. 2, 3.

(*d*) 1 Hawk. P. C. 146. 4 Hawk. P. C. 3; *R. v. Robinson*, 2 Burr. 800.

(*e*) Courts of Record are those whose judicial acts and proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the *records* of the Court, and their truth cannot be questioned. This power to fine and imprison is one of their chief distinguishing marks; and the very erection of a new jurisdiction with power of fine and imprisonment, makes it instantly a court of record. v. 3 St. Bl. 298.

(*f*) v. Judgment of Cave, J., in *R. v. Judge of Brompton County Court*, L. R. [1893], 2 Q. B. 195; 62 L. J. (Q. B.) 604; 68 L. T. 829; 41 W. R. 648; 57 J. P. 648.

CHAPTER V.

OFFENCES AGAINST THE PUBLIC PEACE.

MANY of the crimes mentioned in other chapters involve a breach of the peace. But the offences now to be dealt with are those in which the breach of the peace is the prominent feature. In some, for example in libel, at first sight the injury done to the individual appears to be the principal point; but a consideration of the way in which the law deals with the offence shows that it is otherwise. Thus, proof of the truth of a libel will not amount to a defence, unless it was for the public benefit that the matter should be published.

Offences more particularly against the public peace.

RIOTS (a).

There are two minor offences, which, as steps to the graver crime of riot, must first be noticed.

An *unlawful assembly* is any meeting of three or more persons under such circumstances of alarm, either from the large numbers, or the mode or time of the assembly, &c., as in the opinion of firm and rational men are likely to endanger the peace; there being no aggressive act actually done (b). All parties joining in and countenancing the proceedings are criminally liable. It is generally considered that the intention must be to do something which, if actually executed, would amount to a riot. But a lawful assembly is not rendered unlawful by reason of the knowledge of those taking part in it that opposition will be raised to it, which opposition will in all

Unlawful assembly.

(a) For riotous destruction of buildings, machinery, &c., v. p. 271.

(b) *R. v. Vincent*, 9 C. & P. 91.]

probability give rise to a breach of the peace by those creating it (a).

Rout.

A *rout* is said to be the disturbance of the peace caused by those who, after assembling together to do a thing which, if executed, would amount to a riot, *proceed* to execute that act, but do not actually execute it. It differs from a riot only in the circumstance that the enterprise is not actually executed.

Riot.

A *riot* is a tumultuous disturbance of the peace by *three* or more persons, assembling together of *their own authority*, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a *private* nature, and afterwards *actually executing* the same, in a violent and turbulent manner, to the terror of the people, and this whether the act intended be of itself *lawful or unlawful* (b).

An example will more clearly show the difference between these three crimes. A hundred men armed with sticks meet together at night to consult about the destruction of a fence which their landlord has erected: this is an unlawful assembly. They march out together from the place of meeting in the direction of the fence: this amounts to a rout. They arrive at the fence and, amid great confusion, violently pull it down: this is a riot.

Essentials of
a riot.

To constitute a riot, the object need not be unlawful, if the acts are done in a manner calculated to inspire terror. But there must be an unlawful *assembly*: therefore a disturbance arising among people already met together on a lawful occasion will be a mere affray of which none will be guilty except those who actually take part in it; unless, indeed, there be a deliberate forming into parties. The object must be of a local or private

(a) *Beatty v. Gillbanks*, L. R. 9 Q. B. D. 308; 51 L. J. (M.C.) 117; 15 Cox 138. Warb, L. C. 47.

(b) 1 Hawk. c. 65, s. 1.

nature ; otherwise, as if to redress a public grievance, it may amount to treason (*a*).

The gist of the offence is the unlawful manner of proceeding, that is, with circumstances of force or violence, or in such a way as to create terror in the minds of the public. Therefore assembling for the purpose of an unlawful object, and actually executing it, though it might be punishable as a conspiracy, is not a riot, if it is done peaceably (*b*).

These three offences are common law misdemeanors, punishable by fine or imprisonment, or both.

For the case of riots which assume a more formidable aspect, further provision is made by statute (*c*). If twelve or more persons are unlawfully and riotously assembled to the disturbance of the peace, and being required by proclamation (*d*), by a justice of the peace, sheriff or under-sheriff, mayor, or other head officer of a town, to disperse, they then continue together for an hour after, they are guilty of felony, and liable to penal servitude to the extent of life, or imprisonment not exceeding three years (*e*). It is a felony attended by the same punishment to oppose the reading of the proclamation : and this opposition will not excuse those who know that the proclamation would have been read, had it not been for this hindrance (*f*). Prosecutions under this Act must be commenced within twelve months after the commission of the offence (*g*).

A course of proceeding founded on an old statute (*h*), *Posse comitatûs*.

(*a*) v. p. 41.

(*b*) v. 1 Hawk. c. 65. *Clifford v. Brandon*, 2 Camp. at p. 369.

(*c*) Riot Act, 1 Geo. 1, st. 2, c. 5 ; and 7 Wm. 4 & 1 Vict. c. 91, s. 1.

(*d*) "Reading the Riot Act."

(*e*) 1 Geo. 1, st. 2, c. 5, s. 1. The form of proclamation is prescribed by the statute, "Our sovereign lord the king chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies—God save the King."

(*f*) *Ibid.* s. 5.

(*g*) *Ibid.* s. 8.

(*h*) 13 Hen. 4, c. 7.

still unrepealed, is provided for offences of this character. Any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatûs* (*i.e.*, a force consisting of all able-bodied men except clergymen) and suppress a riot, rout, or unlawful assembly ; may arrest the rioters ; and make a record of the circumstances on the spot, which will be sufficient evidence of the conviction of the offenders. Any battery, wounding, or killing that may happen in suppressing the riot is justifiable.

The riotous demolishing of buildings, machinery, &c., is punishable by penal servitude for life under a more recent statute (*a*).

AFFRAY.

Affray.

A fighting between two or more persons in some *public* place, to the terror of Her Majesty's subjects ; for example, a prize fight. If it takes place in private, it will be an assault. It differs from a riot, inasmuch as there must be three persons to constitute the latter, and also in not being premeditated.

Mere quarrelsome or threatening words do not amount to an affray ; though of course, according to first principles (*b*), a person may be guilty of an affray, though he uses no actual force himself ; for example, by assisting at a prize fight.

Suppression
and punish-
ment.

An affray may be suppressed and the parties separated by a private person who is present ; and a peace officer is bound to interfere. The offence is a common law misdemeanor, punishable by fine or imprisonment, or both.

CHALLENGE TO FIGHT.

Challenge to
fight.

(a) To challenge to fight, either by word or letter ; or
(b) to be the bearer of such challenge ; or (c) to provoke

(a) 24 & 25 Vict. c. 97, ss. 11-14. See *post*, pp. 271, 272.

(b) *v.* p. 28.

another to send a challenge, is a misdemeanor at common law punishable by fine or imprisonment, or both. It is not necessary that actual fighting should follow. Provocation, however great, is no justification (*a*), though it may mitigate the sentence of the court.

SENDING THREATENING LETTERS.

It is very obvious that the receipt of a threatening letter is not unlikely to lead to a breach of the peace on the part of the receiver. Therefore to prevent such breach, and at the same time to punish what is an offence against the security of the subject, it has been provided that, if any person, knowing the contents, sends or delivers any letter or writing threatening to burn or destroy any house, barn, or other building, or grain or other agricultural produce in a building, or any ship; or to kill, maim, or wound any cattle, he is guilty of felony, and may be punished by penal servitude to the extent of ten years (*b*). The same consequences are attached to sending letters threatening to murder (*c*). Threatening letters.

We may notice here certain other cases of sending threatening letters, though their nature admits also of their being treated of under the title "Larceny." If any person, knowing the contents, sends or delivers any letter or writing, *demanding with menaces* and without reasonable cause any chattels, money, or other property, he is punishable for the felony by penal servitude to the extent of life (*d*). The word "menaces" in the section which creates this offence includes not only threats of injury to the person or property of the prosecutor, but also a threat to accuse of misconduct although such misconduct may not amount to a crime (*e*). If the threatening be otherwise than by letter, the limit of the penal servitude Extortion by means of threats.

(*a*) *R. v. Rice*, 3 East, 581.

(*b*) 24 & 25 Vict. c. 97, s. 50.

(*c*) *Ibid.* c. 100, s. 16.

(*d*) *Ibid.* c. 96, s. 44.

(*e*) *R. v. Tomlinson*, L. R. [1895], 1 Q. B. 706; 64 L. J. (M.C.) 97; 72 L. T. 155; 43 W. R. 544.

is five years (*a*). Sending a letter or writing containing to the knowledge of the sender accusations or threats to *accuse any person of a crime punishable by law with death or penal servitude for not less than seven years, or of an assault with intent to commit a rape, or of an attempt to commit a rape or an unnatural crime with a view to extort money or other property*—is a felony punishable by penal servitude to the extent of life (*b*). The punishment is the same, though the threat to accuse of any of these crimes be not by letter (*c*). It is immaterial whether the person threatened be innocent or guilty of the offence imputed to him (*d*), inasmuch as the gist of the offence is the extortion. The same punishment is awarded in the case of one inducing another by violence or threats to execute or to destroy a deed or valuable security, with intent to defraud (*e*).

LIBEL AND INDICTABLE SLANDER.

Offences of this class are rightly considered as affecting the public peace, inasmuch as their tendency is directly to provoke breaches of the peace. This will appear from the definition of a libel.

Definition of libel.

A libel is a malicious defamation made public either by printing, writing, signs, pictures, or the like, tending either to blacken the memory of one who is dead or the reputation of one who is alive, by exposing him (or his memory) to public hatred, contempt, or ridicule (*f*).

(*a*) 24 & 25 Vict. c. 96, s. 45.

(*b*) *Ibid.* s. 46.

(*c*) *Ibid.* s. 47.

(*d*) *R. v. Gardner*, 1 C. & P. 479.

(*e*) 24 & 25 Vict. c. 96, s. 48.

(*f*) v. 1 Hawk. c. 73. This definition refers only to private libels, and not to those already noticed, of a seditious, blasphemous, or indecent nature (v. pp. 46, 62). But in all cases of libel the ground of criminal proceedings is the same, namely, "The public mischief which libels are calculated to create, in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country, and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace." 1 Russ. 597.

To those who are aggrieved by a libel two courses are open, either to prosecute the offender criminally by indictment or information, or to seek redress by a civil action. This is the general rule, but there are cases where the wrongdoer is criminally punishable, although no action will lie against him. This is the case when the matter of the libel is true. It is a clearly established rule, that in a civil action the truth of the matter is a good defence; whereas in a criminal proceeding it does not amount to a defence unless it be proved not only that the matter was true, but also that it was for the public benefit that it should be published. The gist of the crime is the provocation to a breach of the peace by exciting feelings of revenge, &c.; and the libel is not divested of this characteristic on account of its being founded on truth. However, even in a criminal proceeding, the truth may be inquired into, and the court, in pronouncing sentence, may consider whether the guilt of the defendant is aggravated or mitigated by the plea and evidence of the truth (*a*). Under the Act referred to it had been held that the question of the truth of the libel could not be investigated before a magistrate, but only on plea at the trial (*b*). But this rule has, in the case of newspaper libels, been since altered by Act of Parliament; and a court of summary jurisdiction, upon the hearing of a charge against the publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit and as to the truth of the libel, and if the court is of opinion, after hearing such evidence, that there is a probable presumption that a jury would acquit the person charged, it may dismiss the case (*c*). And if the court in such a case thinks the libel to be one of a trivial character, it may, with the consent of the defendant, deal with the matter summarily by fining him a sum not exceeding £50 (*d*).

Civil and
criminal pro-
ceedings in
libel.

Plea of
justification.

(*a*) 6 & 7 Vict. c. 96, s. 6 (Lord Campbell's Act).

(*b*) *R. v. Carden*, L. R. 5 Q. B. D. 1; 49 L. J. (M.C.) 1.

(*c*) 44 & 45 Vict. c. 60, s. 4.

(*d*) *Ibid.* s. 6.

Literary criticism.

The definition of libel as a writing and publishing of anything which renders another ridiculous or contemptible must be taken with a certain qualification; for a literary criticism will not be a punishable libel though it makes the author appear ridiculous, if it does not exceed the limits of a fair and candid criticism by attacking the personal character of the author (a). The same principle applies to criticism of the public acts of public men.

Libels on deceased persons;

on foreign potentates;

on a class.

In prosecutions for libels vilifying the character of deceased persons, it must be shown that the intention has been to bring contempt on the families of the deceased, or to stir up hatred against them, or to excite them to a breach of the peace (b). Writings tending to degrade and defame persons of position in foreign countries at peace with the Queen are libellous, as tending to interrupt the pacific relations between the two countries (c). Writings, though they do not reflect on the character of any particular individual, as, for example, on bodies of men, may be libellous if they tend to a breach of the peace, or to stir up hatred towards a class generally (d).

When an indictment will not lie.

There are certain occasions upon which the publication of matter which is libellous is not punishable. These are known as *privileged* occasions, and matter so published is said to be *privileged*. This privilege is either *absolute* or *qualified*.

Privileged communications.

Absolute privilege exists with regard to (1) Judicial proceedings. Neither party, witness, counsel, jury, nor judge can be made to answer civilly or criminally for words spoken or written in the ordinary course of proceedings in any court recognised by law (e). (2) Parliamentary debates. The publication of these debates is protected by 3 & 4 Vict. c. 9, ss. 1, 2. (3) The reports,

(a) *v. Campbell v. Spottiswoode*, 3 B. & S. 709.

(b) *R. v. Topham*, 4 T. R. 126.

(c) *R. v. Peltier*, 28 St. Tr. 530.

(d) *R. v. Osborn*, 2 Barn. K. B. 138, 166.

(e) *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 263; 28 L. T. 134.

correspondence, &c., of public servants relating to State matters or to questions of military or naval discipline, if made in the course of their duty (a).

Qualified privilege exists where the publication is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned; the person to whom publication is made having a corresponding interest in having it made to him (b).

Numerous instances of this qualified privilege might be given, such as communications made by a former employer in answer to inquiries as to the character of a servant, and information given by one trader to another in answer to inquiries as to the solvency of persons with whom the latter proposes to deal.

In cases where the privilege is absolute no proceedings for libel can be taken against the person publishing the libellous matter, this protection being given on the ground of public policy. But when the privilege is only qualified the libeller is not protected from punishment if it can be shown that he was influenced by malicious motives; as although the law presumes that on privileged occasions the circumstances are such as *prima facie* to negative the inference of malice, yet nevertheless, if malice is actually proved to have existed, the presumption of law is rebutted. Malice exists where the publication is untrue to the knowledge of the publisher, or is unreasonable or not candid, or where it has been made officiously or from any improper or indirect motive.

It constitutes a more serious offence to embody the objectionable matter in writing than merely to give verbal utterance to it. So that an indictment (so also an action) may be maintained for words written for which

Indictable
slander.

(a) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94. *Chatterton v. Secretary of State for India*, L. R. [1895], 2 Q. B. 189.

(b) *Toogood v. Spyring*, 1 C. M. & R. p. 193. *Hebditch v. MacIlwaine*, L. R. [1894], 2 Q. B. 54.

an indictment could not be maintained if they were merely spoken; for example, to write that a man is a swindler (*a*). It may be stated generally on the subject of *indictable slander* (*b*), that no words spoken, however scurrilous, even though spoken personally to an individual, are the subject of indictment unless they directly tend to a breach of the peace; for example, by inciting to a challenge. We must here except words seditious, blasphemous, grossly immoral, or uttered to a magistrate while in the execution of his duty.

Form of a
libel.

As to the *form* in which the libel is expressed, it will be none the less an offence because the libellous imputation is conveyed indirectly; for example, by a hint, question, exclamation, irony, &c. Even hanging a man in effigy amounts to libel, as tending to bring him into contempt and to provoke a breach of the peace. And a mere subterfuge, as by writing only a letter or two of the name, will not avail if there be satisfactory evidence of what person is meant. The words used are to be taken in the sense ordinarily understood. Where the libellous signification of the words does not appear on the face of the libel, innuendoes are inserted in the indictment, and proved by evidence showing the intended application of the words.

Publication.

As to the *publication*, or making public of the libel. To make a writing a libel it must be published, *i.e.*, communicated to some person: for the mere writing or composing of a defamatory paper which is never read or divulged to others, will not amount to a libel. But, on the other hand, a slight circumstance will be sufficient to constitute a publication. Thus communication, though only to a single person, even if he be the person defamed (*c*), is a sufficient publication to render the libeller responsible in a criminal prosecution, even though the

(*a*) *P'Anson v. Stuart*, 1 T. R. 748.

(*b*) "Libel" is the term applied to words written. "Slander" to those merely spoken.

(*c*) 1 Hawk. c. 73, s. 11; *R. v. Adams*, L. R. 22 Q. B. D. 66; 58 L. J. (M.C.) 1; Warb. L. C. 57.

libel be contained in a private letter. It will be remembered that the gist of the criminal offence is that the libel tends to provoke a breach of the peace, and the fact that the publication is to the person libelled would be even more likely to produce that result than if the publication were to another person. It is otherwise in civil proceedings, as to render the defendant liable to *damages* there must be a publication to some person other than the party defamed. The innocent dissemination of a paper, which the disseminator has no reason to believe contains libellous matter, does not amount to a publication (a). In the case just referred to the jury found as facts, that the defendants, who were newsvendors, in the ordinary course of business sold a newspaper containing a libel without knowing, and without negligence in not knowing, either that there was a libel in it, or that the newspaper was of such a character as to be likely to contain libellous matter. The communication of a libel by mistake is not, in a criminal proceeding, a publication (b).

The mere publication of matter which on the face of it is libellous is presumptive evidence of the malice which is necessary to constitute a crime (c), and therefore the proof of innocence of intention lies on the defendant. But if the writing is *prima facie* innocent, malice may be proved from special circumstances which may be laid before the jury. It is usual to allege in the indictment that the publication was "malicious," but such an allegation is not actually necessary (d).

The facts to be established on a prosecution for libel are :

(a) The making and publishing of the writing.

(b) That the writing is libellous in its nature.

(a) *Emmens v. Pottle*, L. R. 16 Q. B. D. 354 ; 55 L. J. (Q.B.) 51 ; 34 W. R. 116.

(b) *R. v. Paine*, 5 Mod. 167.

(c) *Bromage v. Prosser*, 4 B. & C. 247, 255.

(d) *R. v. Munslow*, L. R. [1895], 1 Q. B. 758 ; 64 L. J. (M.C.) 138 ; 72 L. T. 301 ; 43 W. R. 495.

Fox's Act.

For a long period it was maintained by judges and others that it was the province of the jury to deal with the first of these questions only, and that the second was to be determined by the judge. But the controversy was settled by Fox's Act (a), which enacted that the jury may give a general verdict of Guilty or Not Guilty on the whole matter in issue, and are not, as formerly, to be required or directed by the court to find the defendant guilty if they are satisfied that the writing was published and bore the meaning ascribed to it in the indictment. But the judge may state his opinion to the jury, though they are not bound to act upon it, and before he allows the case to go to the jury the judge must be satisfied that the terms of the alleged libel are such as to bear a defamatory meaning (b).

Who are
criminally
responsible.

Every one who is concerned in the writing or publishing is liable to conviction for the libel unless the part he takes in the transaction is a lawful or an innocent act (c).

The proprietor of a newspaper, or other principal, is answerable criminally as well as civilly for the acts of his servant in the publication of a libel. It would be exceedingly dangerous to hold otherwise; for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might escape altogether (d). However, it is now provided that in such a case the defendant may prove that the publication was made without his authority, consent, or knowledge, and that the publication did not arise from want of due care or caution on his part (e). Though the statute does not expressly say whether this is a complete defence, or only serves to mitigate punishment, it seems that it will com-

(a) 32 Geo. 3, c. 60.

(b) *Capital and Counties Bank v. Henty*, L. R. 7 App. Cas. 741, 744; 52 L. J. Q. B. 232; 47 L. T. 662; 31 W. R. 157.

(c) *R. v. Clark*, 1 Barn. K. B. 304.

(d) *Per Tenterden, C.J., R. v. Gutch*, Moo. & M. 433.

(e) 6 & 7 Vict. c. 96, s. 7.

pletely rebut the *prima facie* presumption of publication (a).

A contemporaneous report in a newspaper of proceedings in any court of justice is privileged if it be fair and accurate, and even though the proceeding may be only an *ex parte* application (b).

A report published in any newspaper of the proceedings of a public meeting will be privileged, if such meeting was lawfully convened for a lawful purpose, whether the admission be general or restricted, and if such report is fair and accurate and published without malice, and if the publication of the matter complained of is for the public benefit; but this protection will not be allowed to a defendant who has refused to insert in the newspaper in which the libel appeared a reasonable explanation or contradiction (c). A similar protection is given to reports of the meetings of vestries and similar bodies to which the public or reporters are admitted.

And no criminal prosecution can be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the order of a judge at Chambers being first obtained, and the person against whom the application for such an order is to be made must have notice of the intended application (d).

Libel is a misdemeanor, punishable in the case of one Punishment, who publishes a defamatory libel, knowing it to be false, by imprisonment not exceeding two years, and fine (e). But if the prosecution do not prove that the defendant knew it to be false, the punishment is fine or imprisonment not exceeding one year, or both (f). Libel is one

(a) *R. v. Holbrook*, L. R. 3 Q. B. D. 60; 4 Q. B. D. 42.

(b) *Lewis v. Levy*, E. B. & E. 537; *Kimber v. The Press Association*, L. R. [1893], 1 Q. B. 65; 62 L. J. (Q. B.) 152; 67 L. T. 515; 41 W. R. 17; 57 J. P. 247.

(c) 51 & 52 Vict. c. 64, ss. 3, 4.

(d) *Ibid.* s. 8.

(e) 6 & 7 Vict. c. 96, s. 4.

(f) *Ibid.* s. 5. *v. Boaler v. The Queen*, L. R. 21 Q. B. D. 284; 57 L. J. (M.C.) 85.

of the offences to which the Vexatious Indictments Act applies (*a*).

Costs.

In cases of private prosecutions for libel, if judgment is given for the defendant, he is entitled to recover his *costs* from the prosecutor. And if the defendant has pleaded a justification of the libel (on the ground of truth, &c.), and so has put the prosecutor to extra expense, on the defendant failing to establish his plea, the prosecutor can recover from him the cost occasioned by such plea (*b*).

The law as to criminal proceedings for libel by husband or wife against the other is not altered by the Married Women's Property Act, 1882, which enables criminal proceedings to be taken by a wife against her husband, and *vice versa*, for the protection and security of the wife's separate estate or the husband's property. A prosecution for libel is not for the protection and security of such property, and therefore a wife cannot prosecute her husband or give evidence against him upon a prosecution for a personal libel upon herself (*c*).

Another offence connected with libel may be noticed: Publishing, or threatening to publish, or proposing to abstain or prevent from publishing, a libel in order to extort money or some other valuable thing, is a misdemeanor punishable by imprisonment not exceeding three years (*d*).

FORCIBLE ENTRY OR DETAINER.

Forcible entry or detainer.

The violent taking, or the violent keeping possession of lands and tenements with menaces, force, and arms and without the authority of the law. It is no defence to a charge of forcible entry that the accused has been unjustly turned out of possession (*e*), inasmuch as he has his remedy at law, and the fact of his right does not

(*a*) v. p. 350.

(*b*) 6 & 7 Vict. c. 96, s. 8.

(*c*) *R. v. Lord Mayor of London*, L. 11. 16 Q. B. D. 772; 55 L. J. (M.C.) 118; 54 L. T. (N.S.) 761; 34 W. R. 544; Warb. L. C. 272.

(*d*) 6 & 7 Vict. c. 96, s. 3.

(*e*) 5 Rich. 2, c. 8.

diminish the breach of the peace. If there be not employed such force or menaces as are calculated to prevent resistance, it is a mere trespass (a).

The offence is a misdemeanor, punishable by fine and imprisonment. The court may summarily restore possession to the person entitled, by a writ of restitution (b).

Blackstone notices certain other offences which are punishable by fine and imprisonment as misdemeanors against the peace: Riding or going armed with dangerous or unusual weapons—spreading false news—false or pretended prophecies, with intent to disturb the peace.

Other offences
against the
peace.

(a) *R. v. Smyth*, 5 C. & P. 201. See also *Louis v. Telford*, L. R. 1 App. Cas. 414; 45 L. J. (Ex.) 613; 35 L. T. 69; Warb. L. C. 50; *Milner v. Maclean*, 2 C. & P. 17; *R. v. Child*, 2 Cox, C. C. 102; *Edwick v. Hawes*, L. R. 18 Ch. D. 199.

(b) v. 21 Jac. 1, c. 15.

CHAPTER VI.

OFFENCES AGAINST PUBLIC TRADE.

SMUGGLING.

Definition of smuggling.

SMUGGLING is the importing or exporting either (a) goods without paying the legal duties thereon ; or (b) prohibited goods. The existing law on the subject is contained chiefly in the Customs Consolidation Act, 1876 (a).

Forfeiture, &c

The statute subjects to forfeiture the goods which have in any way been the subjects of smuggling practices. Persons taking goods out of a warehouse without paying the duties are declared to be guilty of a misdemeanor (b).

Shooting at vessels belonging to the navy or revenue service, or shooting at or wounding an officer engaged in the prevention of smuggling, is declared to be a felony punishable by penal servitude for not less than three years, or imprisonment not exceeding three years (c).

To procure persons to assemble for the purpose of smuggling is punishable by imprisonment for twelve months ; and if any person so offending be armed or disguised, or being so armed or disguised be found with any goods liable to forfeiture within five miles of the sea coast or of any navigable river, he is punishable by imprisonment with hard labour to the extent of three years (d).

Making signals under certain circumstances to smuggling vessels is a misdemeanor punishable by fine of £100, or imprisonment not exceeding one year (e).

(a) 39 & 40 Vict. c. 36.
 (c) *Ibid.* s. 193.
 (e) *Ibid.* s. 190.

(b) *Ibid.* s. 85.
 (d) *Ibid.* s. 189.

All proceedings for offences against Acts relating to Proceedings. the Customs must be commenced within three years after the date of the offence (a).

OFFENCES AGAINST THE BANKRUPT LAWS.

The Debtors Act, 1869 (b), enumerates several acts Offences by bankrupts, &c. which, if done by a person in respect of whose estate a receiving order in bankruptcy has been made, are misdemeanors punishable by imprisonment not exceeding two years. The following acts, *if done fraudulently*, are the chief:

i. Not to the best of his belief making full discovery of his estate to the administering trustee.

ii. Neglecting to deliver up property under his control.

iii. Neglecting to deliver up books, papers, &c., relating to his property.

iv. Within four months before the presentation of the bankruptcy petition, or the making of a receiving order, or thereafter, concealing property to the value of £10.

v. Within the same time, or thereafter, removing property to the value of £10.

vi. Making material omissions in statements relating to his affairs.

vii. Failing for a month to inform the trustee of any false debt which he knows to have been proved.

viii. After the presentation of the bankruptcy petition, preventing the production of papers, &c., relating to his affairs, with intent to conceal the state of his affairs, or to defeat the law.

(a) 39 & 40 Vict. c. 36, s. 257.

(b) 32 & 33 Vict. c. 62; and see 46 & 47 Vict. c. 52, s. 163; 53 & 54 Vict. c. 71, s. 26.

ix. After such petition, or within four months before, concealing, destroying, &c., such documents.

x. Within the same limits of time making false entries in such documents, &c.

xi. Within the same limits parting with, altering, or making omissions in such documents.

xii. Within the same limits attempting to account for any part of his property by fictitious losses or expenses.

xiii. Within four months before the presentation of the bankruptcy petition obtaining, by false representation or other fraud, any property on credit without paying for it.

xiv. Within the same time, obtaining property on credit under the false pretence of carrying on his business.

xv. Within the same time pawning or disposing of, otherwise than in the ordinary way of trade, property obtained on credit and not paid for.

xvi. Any false representation or other fraud in order to obtain the consent of any of his creditors to an agreement with reference to his affairs, or his bankruptcy.

Absconding,
&c., a felony

One offence is a felony, punishable by imprisonment not exceeding two years; namely, after the presentation of a bankruptcy petition by or against a person, or within four months before, fraudulently absconding or attempting to abscond from England with property of his own to the value of £20 (a).

Offences tend-
ing to defraud
creditors.

Certain other offences are misdemeanors, punishable by imprisonment not exceeding one year :

For *any* person (whether he become bankrupt or not) :

i. In incurring a debt or liability, to obtain credit under false pretences, or by means of any other fraud.

(a) 32 & 33 Vict. c. 62, s. 12.

A man may be convicted of this offence who orders food at a restaurant knowing that he has not the money to pay for it, as he must have been aware that the custom at such establishments is that refreshments shall be paid for before the customer leaves (*a*).

ii. With intent to defraud any creditor, to make any gift, delivery or transfer of, or any charge on, his property.

iii. With intent to defraud his creditors to conceal or remove any part of his property since or within two months before the date of any unsatisfied judgment or order for money obtained against him (*b*).

It is also a misdemeanor, punishable in the same way, for a creditor wilfully and fraudulently to make a false claim in a bankruptcy (*c*).

All these misdemeanors fall within the provisions of the Vexatious Indictments Act (*d*).

It is also a misdemeanor, punishable as a misdemeanor under the Debtors Act, for an undischarged bankrupt to obtain credit to the extent of £20 without disclosing the fact that he is an undischarged bankrupt; nor is it necessary in such a case to show that the defendant had any intention to defraud (*e*); nor that he stipulated for any definite term of credit (*f*).

If a trustee in bankruptcy or an official receiver report to the Bankruptcy Court that a bankrupt or debtor has been guilty of an offence under the Debtors Act, or under the Bankruptcy Act, 1883, or if the court is satisfied upon the representation of any creditor that there is ground to believe that the bankrupt or debtor has been guilty of such offence, the court shall, if there be a reasonable probability of conviction, order a prosecution (*g*).

Prosecution
ordered by
the court.

(*a*) *R. v. Jones*, L. R. [1898] 1 Q. B. 119; 67 L. J. (Q.B.) 41; 77 L. T. 503; 46 W. R. 191.

(*b*) 32 & 33 Vict. c. 62, s. 13.

(*c*) *Ibid.* s. 14.

(*d*) *Ibid.* s. 18, v. p. 350.

(*e*) 46 & 47 Vict. c. 52, s. 31; *R. v. Dyson*, L. R. [1894], 2 Q. B. 176; 63 L. J. (M.C.) 124; 70 L. T. 877; 42 W. R. 526; 58 J. P. 528.

(*f*) *R. v. Peters*, L. R. 16 Q. B. D. 636; 16 Cox, 36; Warb. L. C. 216.

(*g*) 32 & 33 Vict. c. 62, s. 16, as amended by 46 & 47 Vict. c. 52, s. 164.

COUNTERFEITING TRADE-MARKS AND APPLYING FALSE
TRADE DESCRIPTIONS.

Offences
relating to
trade-marks.

This subject seems peculiarly to fall within a chapter dealing with offences against trade, though it would also find a place under the heading "Forgery." The law as to offences relating to trade-marks is contained in the Merchandise Marks Act, 1887 (*a*). By this Act every person who (1) forges any trade-mark; or (2) falsely applies to goods any mark so nearly resembling a trade-mark as to be calculated to deceive; or (3) makes any die, &c., for the purpose of forging a trade-mark; or (4) applies any false trade description to goods; or (5) disposes of or has in his possession any die, &c., for the purpose of forging a trade-mark; shall, unless he proves that he acted without intent to defraud (*b*), be guilty of an offence against the Act (*c*). Further, every person who has in his possession for sale, or manufacture, any goods to which any forged trade-mark or false trade description is applied, shall, unless he proves (1) that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade-mark, or trade description; and (2) that, on demand made by the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods; or (3) that he had otherwise acted innocently, be guilty of an offence against the Act (*d*). Every person guilty of an offence against the Act is liable (1) on conviction on indictment, to imprisonment, with or without hard labour, for two years, or to fine; (2) on summary conviction, to imprisonment, with or without hard labour, for four months, or to a fine of £20, and, in the case of a second conviction, to imprisonment for six months, or to

(*a*) 50 & 51 Vict. c. 28.

(*b*) The "fraud" here referred to has been held to mean the putting off on a purchaser, not necessarily a bad article, or one of less value, but one different from that which he has stipulated to buy. *Starey v. Chilcorth Powder Co.*, L. R. 24 Q. B. D. 90; 59 L. J. (M.C.) 13.

(*c*) 50 & 51 Vict. c. 28, s. 2 (1).

(*d*) *Ibid.* s. 2 (2).

a fine of £50 ; (3) in any case, to forfeit any article, by means of which the offence has been committed (*a*). The expression "trade description," as used in this Act, means any statement as to the number, quantity, weight, &c., of any goods ; or the place in which they were made or the mode of their manufacture ; or the material of which they are composed ; or as to the goods being the subject of an existing patent, privilege, or copyright (*b*). The Act exempts from punishment a person who makes dies, &c., for others, or applies marks to the goods of others, in the ordinary course of his business, provided he has acted in good faith and has taken proper precautions, and that when required to do so he gives the injured person all the information in his power (*c*). No proceedings are to be taken under the Act after three years from the offence, or after one year from its discovery (*d*).

The piracy of a registered design is punishable by pecuniary penalty (*e*).

Other offences against trade, *e.g.*, False Pretences, Embezzlement, Cheating, &c., may more conveniently be treated of under the title "Offences against Property." One class only of offences remains to be noticed here, and that a somewhat complex and comprehensive one.

UNLAWFUL INTERFERENCE WITH TRADE BY COMBINATIONS, ETC.

It is perfectly legal for workmen to protect their interests by meeting or combining together, or forming unions, in order to determine and stipulate with their employers the terms on which only they will consent to work for them. But this right to combine must not be allowed to interfere with the right of those workmen who desire to keep aloof from the combination, to dispose of their labour with perfect freedom as they think fit. Nor must it interfere with the right of the masters to have

Right of combination, how far it may be exercised.

(*a*) 50 & 51 Vict. c. 28, s. 2 (3).

(*c*) *Ibid.* s. 6.

(*d*) *Ibid.* s. 15.

(*b*) *Ibid.* s. 3 (1).

(*e*) 46 & 47 Vict. c. 57. s. 58.

contracts of service duly carried out. Infraction of such rights will bring the wrongdoers within the pale of the criminal law of conspiracy.

The law on this subject is principally contained in the Conspiracy and Protection of Property Act, 1875 (*a*). It will be well to prefix a provision of the Trade Union Act, 1871 (*b*). The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

Acts of unlawful interference which are punishable.

The following acts are forbidden, and are punishable on summary conviction or indictment, by imprisonment not exceeding three months, or penalty not exceeding £20.

i. For *any* (*c*) person, with a view to compel any other person to abstain from doing, or to do, any act (*d*) which such other person has a legal right to do or abstain from doing—to wrongfully and without authority,

(a) Use violence to, or intimidate (*e*), such other person, or his wife, or children, or injure his property.

(b) Persistently follow him about from place to place.

(c) Hide his tools, clothes, or other property, or hinder him in the use thereof.

(d) Watch or beset his house, or other place where he resides, or works, or carries on business,

(a) 38 & 39 Vict. c. 86, repealing 34 & 35 Vict. c. 32 and other Acts.

(b) 34 & 35 Vict. c. 31, s. 2.

(c) This word makes the law of general application, and not restricted to trade disputes, though practically the offence will most frequently occur in connection therewith. The act of one person is sufficient to constitute an offence, and it is not necessary that there should be any crowd or combination. *Smith v. Thomasson*, 16 Cox, 740; Warb. L. C. 220.

(d) The particular act must be specified in the summons and conviction. *R. v. McKenzie*, L. R. [1892], 2 Q. B. 519; 61 L. J. (M.C.) 181; 67 L. T. 201; 41 W. R. 144; 56 J. P. 712.

(e) It has been held by Cave, J., that the meaning of the word "intimidate" must be limited to threats of personal violence. *v. Curran v. Treleven*, L. R. [1891] 2 Q. B. at p. 562.

(commonly known as "picketing"), but not if the object be merely to obtain or communicate information (*a*).

(e) Follow him, with two or more other persons, in a disorderly manner in or through any street or road (*b*).

ii. For a person employed by the municipal authorities, public companies, contractors, or others who have undertaken to supply gas or water, either alone or with others, wilfully and maliciously to break his contract of service, knowing or having reasonable cause to believe that the probable consequence will be to deprive the inhabitants wholly or to a great extent of gas or water (*c*).

Acts causing failure of gas or water.

iii. For a person wilfully and maliciously to break his contract of service, knowing or having reason to believe that the probable consequence will be to endanger human life, or cause serious bodily injury, or expose valuable property to destruction or serious injury (*d*).

Acts endangering life, &c.

Upon a prosecution for any of the above offences, the offender may elect to have the case tried on indictment, and not by a court of summary jurisdiction (*e*).

Procedure.

Trade disputes now form an exception to the general law of conspiracy in one respect. If, in connection with a trade dispute, two or more persons combine to do something which if done by one is not punishable as a crime, they will not, on account of their number, be indictable for the conspiracy at common law (*f*).

Trade disputes and conspiracy.

It may be mentioned that assaults with intent to obstruct the sale of grain, or its free passage, or with force hindering any seaman, keelman, or caster from working at his lawful occupation, or beating or using

Obstructing sale of grain, &c.

(a) *Lyons & Sons v. Wilkins*, L. R. [1896], 1 Ch. 811; 65 L. J. Ch. 601; 74 L. T. 358; 45 W. R. 19; 60 J. P. 325.

(b) 38 & 39 Vict. c. 86, s. 7.

(d) *Ibid.* s. 5.

(e) *Ibid.* s. 9.

(c) *Ibid.* s. 4.

(f) *Ibid.* s. 3.

violence with such intent, is punishable, on summary conviction, by imprisonment not exceeding three months (a).

Spreading false
rumours.

Although the old offences of forestalling, regrating, and engrossing are no longer punishable by law, it is still a misdemeanor to knowingly and fraudulently spread or conspire to spread any false rumour with the intent to enhance or lower the price of any goods, or by force or threats to prevent or endeavour to prevent any goods from being brought to a fair or market (b).

(a) 24 & 25 Vict. c. 100, ss. 39, 40.

(b) 7 & 8 Vict. c. 24, s. 4; *R. v. Waddington*, 1 East, 143.

CHAPTER VII.

CONSPIRACY.

CONSPIRACY is a combination of two or more persons to do an unlawful act, whether that act be the final object of the combination, or only a means to the final end—and whether that act be a crime or an act hurtful to the public, a class of persons, or an individual. Definition of conspiracy.

The term conspiracy is divisible into three heads; first, where the end to be attained is in itself a crime; second, where the object is lawful, though the means to be resorted to are unlawful; third, where the object is to do an injury to a third party, or a class, though, if the wrong were inflicted by a single individual, it would be a civil wrong and not a crime (*a*).

The gist of the offence is the *combination*. Of this offence a single person cannot be convicted, unless, indeed, he is indicted with others, who are dead or unknown to the jurors or are not in custody (*b*). And, on the same ground, man and wife cannot by themselves be convicted, for they are one person. An agreement by two or more persons to do certain acts may be criminal, although those acts, if done by one person, might not expose him to any punishment whatever. For instance, buying goods without intending to pay for them is not in itself a crime (*c*), but an *agreement* between two or more persons to assist each other in doing so would The agreement or combination the gist of the offence.

(*a*) *R. v. Parnell*, 14 Cox, 508.

(*b*) 1 Hawk. c. 72, s. 8; *R. v. Kinnersley*, 1 Str. 193. It follows that where two persons are together indicted and tried for conspiracy both must be convicted or both acquitted. *R. v. Manning*, L. R. 12 Q. B. D. 241; 53 L. J. (M.C.) 85; 51 L. T. N. S. 121; 32 W. R. 720; Warb. L. C. 82.

(*c*) Assuming, of course, that there is no false representation made. See, however, p. 109 as to certain cases of this kind.

amount to a conspiracy (*a*). We have just remarked that the gist of the offence is the agreement. A mere intention will not suffice to constitute the crime (*b*). But if the agreement (the conspiracy itself) can be proved, there is no need to prove that anything has been done in pursuance of it. Of course, the existence of the unlawful agreement is generally evidenced by some overt acts, but these are evidence merely, and not essential if the agreement can be proved otherwise (*c*).

Indefinite
nature of the
crime.

The definition shows a conspiracy to be an agreement to do an *unlawful* act. It is the indefinite meaning of this word "unlawful" that gives to the crime of conspiracy its wide extent. As already stated, three classes of conspiracy may be distinguished (*d*):

Conspiracies
classified
according to
their objects.

1. When the end to be accomplished would be a *crime* in each of the conspiring parties; in other words, a conspiracy to commit a crime. The case of murder is specially provided for by statute; the persons conspiring being liable to penal servitude to the extent of ten years (*e*). And by the same statute one who solicits, encourages, persuades, or endeavours to persuade, or proposes to any person to murder any other person, is liable to the same punishment (*f*). Such an offence may be committed by the publication of an article in a newspaper, although not specifically addressed to any one person (*g*).

2. When the ultimate purpose of the conspiracy is lawful, but the means to be resorted to are criminal, or at the least, illegal; in other words, to conspire to effect a legal purpose by improper means—for example, to support a cause believed to be just by perjured evidence; to break into another's house, in order to obtain one's own property.

(*a*) *R. v. Orman*, 14 Cox, 381; Warb. L. C. 79.

(*b*) *Mulcahy v. R.*, L. R. 3 H. L. App. Cas. at p. 317.

(*c*) *R. v. Gill*, 2 B. & Ald. 204.

(*d*) See Final Report of Roy. Com. on Labour Laws.

(*e*) 24 & 25 Vict. c. 100, s. 4.

(*f*) *Ibid.*

(*g*) *R. v. Most*, L. R. 7 Q. B. D. 244; 50 L. J. (M.C.) 113; 44 L. T. N. S. 423; 29 W. R. 759.

We have already noticed the case of trade conspiracies, and referred to an exception to the common law doctrine in such matters (*a*).

3. Where, with a malicious design to do an injury, the purpose of the conspiracy is to effect a wrong, though not such a wrong as, when perpetrated by a single individual, would amount to an offence against the criminal law. We may distinguish the following cases :

(*a*) Falsely to charge another with a crime—whether from malicious and vindictive motives, or to extort money from him. But, of course, two or more persons may agree to prosecute a person against whom there are reasonable grounds of suspicion.

(*b*) To do an act with intent to pervert the course of justice, for this is an injury to the public at large—for example, when two or more agree together that one of them shall be robbed by the others, in order that they may obtain the statutory reward for conviction (*b*).

(*c*) *Generally*—Wrongfully to injure or prejudice others, whether an individual, a body of men, or the public, in any other manner. The varieties of this offence are innumerable, but two or three examples will suffice : To injure a man in his trade ; to raise the price of the public funds by false rumours ; to violate morality and public decency by inducing a woman to become a common prostitute (*c*). But it is said that not every combination to effect a tort is criminal ; that wherever a combination to commit a civil injury has been held criminal, the injury has been malicious (using the term in the non-technical sense)—for example, a combination to pull down a fence would not be criminal, if the only object of the act were to try a question as to the right of way (*d*).

(*a*) v. pp. 111, 113.

(*b*) *R. v. Macdaniel*, 1 Leach, 45.

(*c*) v. Arch. 1100 for other instances.

(*d*) Rosc. 400.

It is, moreover, lawful for persons to combine for the purpose of underselling an opponent in trade, but no legal justification for such a combination would exist if the agreement were made with the intention of causing temporal harm without reference to the lawful gain of the combining parties or the lawful enjoyment of their own rights (*a*).

Conspiracy is a misdemeanor, punishable by fine or imprisonment, or both; in the case of conspiracy to murder by penal servitude to the extent of ten years (*b*). This crime falls under the provision of the Vexatious Indictments Act (*c*).

It should be noticed that the acts and statements of any of the conspirators in furtherance of the common design may be given in evidence against the others, although they were not present at the time when such acts were done or words spoken. But before this can be done evidence of the existence of the conspiracy must first be given (*d*).

Merger of
conspiracy in
the felony.

If the purpose of the conspiracy is a felonious one and *actually carried out*, the conspiracy is merged in the felony; so that after a conviction for the felony the defendant cannot be tried for the conspiracy. But if the defendant is indicted for the conspiracy, he is not entitled to an acquittal because the facts show a felony. Under such circumstances, however, he cannot be subsequently tried for the felony unless the court has discharged the jury from giving a verdict on the misdemeanor (*e*).

(*a*) *Per* Bowen, L.J. *The Mogul Steamship Co., Ltd. v. M'Gregor and others*, L. R. 23 Q. B. D. 598; 58 L. J. (Q. B. D.) 465; v. also *Allen v. Flood*, L. R. [1893], App. Cas. 1.

(*b*) v. *supra*, p. 116.

(*d*) Taylor on Evidence, p. 590.

(*c*) v. p. 350.

(*e*) 14 & 15 Vict. c. 100, s. 12.

CHAPTER VIII.

OFFENCES AGAINST PUBLIC MORALS, HEALTH, AND
GOOD ORDER.

UNDER this head will be noticed a somewhat miscellaneous class of offences which are considered to affect the public rather than the individual; though some of them at first sight appear rather to concern particular persons, *e.g.*, bigamy. Throughout the whole of the modern criminal law there can be traced an unwillingness to resort to anything characteristic of paternal government. As a rule, mere immorality is not punished until it invades the rights of others than those who participate in it, whether by public evil example or otherwise. Thus, a mere falsehood is not punishable; but if it involves a fraud on another, then the law will punish it.

Morality and
the criminal
law.

BIGAMY.

The offence consists in marrying a second time while the defendant has a former husband or wife still living (*a*).

Bigamy.

Not only is the second marriage void, but it also constitutes a felony; and this whether the second marriage took place in the United Kingdom or elsewhere. There are certain cases which are excepted by the statute which declares the second marriage generally felonious:

Where the
second mar-
riage is not
felonious.

i. A second marriage contracted elsewhere than in England or Ireland by any other than one of Her Majesty's subjects (*b*).

(*a*) 24 & 25 Vict. c. 100, s. 57.

(*b*) *Ibid.*

ii. A second marriage by one whose husband or wife has been continually *absent* from such person for the last seven years, and has not been known by such person to be living within that time (*a*). Where absence for seven years is proved it is for the prosecution to show that the prisoner knew that his wife was alive, and failing proof of such knowledge he is entitled to be acquitted (*b*).

iii. A second marriage by one who, at the time of such second marriage, was *divorced* from the bond of the first marriage.

iv. A second marriage by a person whose former marriage has been declared void by the sentence of any court of competent jurisdiction, as, for instance, in a suit for nullity of marriage (*c*).

In none of these cases is the second marriage a felony; but in the second case it is a mere nullity.

It is no defence to the charge of bigamy that the subsequent marriage would in any case have been void, as for consanguinity or the like (*d*). But if the first marriage is void, the second will not be bigamous (*e*). There was at one time much conflict of judicial opinion as to whether a *bona fide* belief by a prisoner at the time of the second marriage that her husband was then dead, such belief being based on reasonable grounds, was a sufficient defence although the period of seven years mentioned in the statute had not expired. In consequence of this conflict of opinion, Mr. Justice Stephen, who tried a prisoner on this charge, stated a case for the opinion of the Court for Crown Cases Reserved, after directing the jury that a belief in good faith and on reasonable grounds by the prisoner that her husband was dead was no defence. In this case the husband had not been heard of for five years preceding the second mar-

(*a*) 24 & 25 Vict. c. 100, s. 57.

(*b*) *R. v. Curgerwen*, L. R. 1 C. C. R. 1; 35 L. J. (M.C.) 58.

(*c*) 24 & 25 Vict. c. 100, s. 57.

(*d*) *R. v. Allen*, L. R. 1 C. C. R. 367; 41 L. J. (M.C.) 101; Warb. L. C. 74.

(*e*) 1 Hale, P. C. 693.

riage, but reappeared shortly after it. The jury convicted the prisoner, stating, however, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage. The court was divided in opinion, but the majority of the judges decided, and it must now be taken as settled law, that if in such a case the jury are satisfied of the prisoner's *bona fides*, and that she had reasonable grounds to believe that her husband was dead, she is entitled to an acquittal (a).

The first (*i.e.*, the real) wife or husband is not a competent witness for the prosecution; but of course the (so-called) second wife or husband is.

This felony is punishable by penal servitude to the extent of seven years (b). The man (or woman) who goes through the form of marriage with the bigamist, knowing her to be such, does not altogether escape. He may be indicted as principal in the second degree, having been present aiding and assisting the woman in committing the felony. X

There are certain other offences connected with marriage. For instance, persons solemnising marriage, except in the manner required by law, are guilty of felony (c). Making false declarations, signing false notices or certificates of marriage, &c., are offences attended by the penalties of perjury (d).

INDECENT CONDUCT.

To this head may be referred the public and indecent exposure of the person, which is a nuisance at common law. An intention to outrage decency or to annoy need not be shown. For instance bathing in a state of nudity

Indecent conduct, when criminal.

(a) *R. v. Tolson*, L. R. 23 Q. B. D. 168; 58 L. J. (M.C.) 97; Warb. L. C. 70.

(b) 24 & 25 Vict. c. 100, s. 57.

(c) 4 Geo. 4, c. 76, s. 21; 6 & 7 Will. 4, c. 85, s. 39.

(d) 6 & 7 Will. 4, c. 85, s. 38. As to forging Marriage Licences v. Forgery. As to Abduction, v. p. 172.

near inhabited houses is an indictable offence (*a*). So also is the exposing for public sale or view, any obscene book, print, picture, or other indecent exhibition. Both of these offences are misdemeanors, and punishable by fine or imprisonment with hard labour, or both (*b*). Power is given to magistrates, under certain circumstances, to authorise the searching of houses and other places in which obscene books, &c., are suspected to be sold or otherwise published for gain, and to authorise their seizure and destruction (*c*).

The public exhibition of indecent pictures or writings and the delivery of handbills containing similar obscene matter, are also punishable by fine and imprisonment under the Act 52 & 53 Vict. c. 18, and advertisements relating to diseases arising from sexual intercourse are declared to be indecent within the meaning of the Act.

It is a misdemeanor punishable on conviction on indictment with twelve months' imprisonment with hard labour, or upon summary conviction by a fine of £10, to send in a postal packet any indecent print, book, or article, or to send any postal packet having on its cover any words or marks of an obscene or grossly offensive character (*d*).

GAMING AND GAMING HOUSES.

The law does not deem it within its province to punish such practices as gaming, unless either some fraud is resorted to, or regular institutions are established for the purpose, or play is carried on in a public place so as to amount to a public nuisance.

Gaming.

As to *Gaming*.—If any person by fraud or unlawful device, or ill practice, in playing, betting, or wagering, win any sum of money or valuable thing, he is deemed

(*a*) *R. v. Crunden*, 2 Camp. 89; Warb. L. C. 119.

(*b*) 14 & 15 Vict. c. 100, s. 29.

(*c*) 20 & 21 Vict. c. 83. As to Indecent Assaults, v. p. 170. Disorderly Houses, &c., v. p. 129. Acts of Indecency with a male person, v. p. 170.

(*d*) 47 & 48 Vict. c. 76, s. 4.

guilty of obtaining money by false pretences, and punished accordingly (*a*).

Playing or betting by way of wagering or gaming in any street, road, highway, or other open and *public place*, to which the public have access, with any table or instrument of gaming, or any card, token, or other article used as an instrument of wagering at any game of chance, subjects the player to the punishments of 5 Geo. 4, c. 83 (*b*), as a rogue and vagabond; or else, at the discretion of the magistrate, to a penalty not exceeding 40s. for the first offence, and £5 for any subsequent offence (*c*). A railway carriage in transit where gaming is carried on is a "public place" or an "open place to which the public are permitted to have access" (*d*).

The subject of Lotteries will be considered under the head "Nuisances."

As to *Gaming Houses*.—Houses of this description are regarded as so detrimental to public morality and good order that they are classed among public nuisances. The keepers are guilty of a common law misdemeanor, and liable to fine or imprisonment, or both. Gaming houses.

The chief steps taken by the legislature to suppress the evils of gaming houses are the following. An early statute prohibited the keeping of any common house for dice, cards, or other unlawful games, under a penalty upon the keeper of forty shillings for every day, and upon a player of six shillings and eightpence for every time of playing (*e*). Subsequent statutes included other games under heavier penalties (*f*). By a later statute (*g*) the Legislation as to gaming houses.

(*a*) 8 & 9 Vict. c. 109, s. 17. Inducing one to go to a public-house and drink and toss for wagers, whereby such person lost his watch, is an offence within the meaning of this section. *R. v. O'Connor*, 45 L. T. N. S. 512; 15 Cox, 3.

(*b*) v. p. 134.

(*c*) 36 & 37 Vict. c. 38, s. 3.

(*d*) *Langrish v. Archer*, L. R. 10 Q. B. D. 44; 52 L. J. (M.C.) 47; 47 L. T. N. S. 548; 31 W. R. 183.

(*e*) 33 Hen. 8, c. 9.

(*f*) See 9 Anne, c. 19; 12 Geo. 2, c. 28; 13 Geo. 2, c. 19; 18 Geo. 2, c. 34.

(*g*) 8 & 9 Vict. c. 109, amended by 17 & 18 Vict. c. 38.

statute of Henry VIII. is repealed so far as it prohibited bowling, tennis, or other games of mere skill. Further provision was also made against those who own or occupy any house, room, or place, who shall use the same for the purpose of unlawful gaming. The owner or keeper, and every person assisting in conducting the business of the house, is liable to a penalty not exceeding £500, in addition to the penalty under 33 Hen. 8; or to imprisonment not exceeding twelve months (a).

A common gaming house has been defined to be a house kept or used for playing therein any game of chance or any mixed game of chance or skill, in which either a bank is kept by one of the players or in which the chances are not alike favourable to all the players (b).

A club house where mere games of chance are played nightly is a common gaming house, especially if the stakes are excessive, and the proprietor of the house, and the committee of management, are liable to the penalty of £500; mere players are not, but they may be bound over not to haunt gaming houses, and for playing dice and certain games in gaming houses, fines may be imposed on the players (c).

Betting
houses.

Houses, or places, used for betting, are declared to be gaming houses within the statute. Persons receiving deposits on bets in such houses incur a penalty of £50, or imprisonment for three months. Exhibiting placards, or otherwise advertising betting houses, and offering by such means to give information with a view to betting, are punished by a penalty of £30, or imprisonment for two months (d). Any fixed and recognised spot (such as a stool and an umbrella tent over it on a race-course) may

(a) 8 & 9 Vict. c. 109, s. 4; and 17 & 18 Vict. c. 38, s. 4.

(b) 8 & 9 Vict. c. 109, s. 2. *Jenks v. Turpin*, L. R. 13 Q. B. D. at p. 530; 53 L. J. (M.C.) 161; 15 Cox, 648.

(c) *Jenks v. Turpin*, *supra*; as to the liability of the players, see 33 Hen. 8, c. 9, ss. 8, 9; 12 Geo. 2, c. 28, s. 3; 13 Geo. 2, c. 19, s. 9.

(d) 16 & 17 Vict. c. 119, as amended by 37 Vict. c. 15.

be a betting place within the meaning of the Act (*a*); but, nevertheless, the place must be something in the nature of a betting house or office, and this is not the case where a bookmaker merely stands on a racecourse, in an enclosure to which the public have as free an access as himself (*b*). The Act (*c*) is directed against the owner or occupier of a place used for betting, and not against persons resorting thereto for the purpose of betting (*d*). A *bond fide* club, although it may be intended that betting should be carried on in the club house between the members, but not with non-members, is not a house used for betting within the meaning of this Act (*e*).

The fact that the entrance of a peace officer is obstructed, or that the place is found provided with means of gaming, is evidence that the house is a common gaming house. Heavy penalties are imposed for such obstruction, and also upon any persons found in the house if they refuse their names and addresses, or give them falsely (*f*).

Further, by the Licensing Act of 1872, if any licensed victualler suffers any gaming or unlawful game on his premises, he is liable to penalties not exceeding for the first offence £10; and for the second offence, £20 (*g*).

It has now been made a misdemeanor, punishable by imprisonment with hard labour for three months, or a fine of £100, or both—(1) For the purpose of making a profit to send to a person known to be an infant any advertisement, letter, &c., inviting him *to bet* or to apply for information as to betting, racing, &c., or *to borrow* Soliciting infants to bet or borrow money.

(*a*) *Bous v. Fenwick*, L. R. 9 C. P. 339; 43 L. J. (M.C.) 107; 30 L. T. 524; 22 W. R. 804.

(*b*) *Powell v. The Kempton Park Racecourse Company, Limited*, L. R. [1897] 2 Q. B. 242; 66 L. J. (Q. B.) 601; 77 L. T. 2; 18 Cox C. C. 561. See, however, *R. v. Humphrey*, L. R. [1898], 1 Q. B. 875.

(*c*) 16 & 17 Vict. c. 119.

(*d*) *Snow v. Hill*, 54 L. J. (M.C.) 95; distinguishing *Eastwood v. Millar*, 43 L. J. (M.C.) 139; L. R. 9 Q. B. 440.

(*e*) *Downes v. Johnson*, L. R. [1895], 2 Q. B. 203.

(*f*) 17 & 18 Vict. c. 38.

(*g*) 35 & 36 Vict. c. 94, s. 17.

money (a); or (2) without the sanction of any court, to solicit, for the purpose of making a profit, an infant to make an affidavit in connection with any loan (b). If the letter, &c., is sent to an infant at a university or school, the sender is to be deemed to have known of his infancy unless he proves that he had reasonable grounds for believing the contrary.

COMMON OR PUBLIC NUISANCES.

Nuisance, the term is indefinite.

Another offence of wide and vaguely defined limits is now to be considered. However wide its definition may appear, it is in practice confined to certain classes of acts which interfere with the normal state of order and comfort.

Public and private nuisances distinguished.

Common nuisances are such annoyances as are liable to affect all persons who come within the range of their operation. They consist of acts either of commission or of omission, that is, causing something not warranted by law to be done which annoys the community generally, or neglecting to do something which a legal duty and the common good require. Public nuisances are opposed to private nuisances, which annoy particular individuals only, that is, to which all persons are not liable to be exposed. The distinction is one based on the extent of the operation of the evil and not one relating to the class of evil; inasmuch as all kinds of nuisances which, when injurious to private persons are actionable as private nuisances, when detrimental to the public welfare are punishable on prosecution as public nuisances. It is for the jury to determine whether a sufficiently large number of persons are or may be affected so as to make the nuisance "common" or "public" (c).

Common nuisances not actionable as such.

Common nuisances are indictable as misdemeanors. They do not give rise to civil action by every one who is subjected to the common annoyance. But if any one

(a) 55 Vict. c. 4. ss. 1, 2.

(c) *R. v. White*, 1 Burr. 333.

(b) *Ibid.* s. 4.

can prove special damage, that is, that he is affected in some respect in a way in which the public generally are not, he may pursue his civil remedy and obtain damages.

Another course of proceeding is sometimes available in *Abatement* nuisances, namely, *abatement* or removal of the nuisance by the party's own act. In private nuisances this is commonly allowed to be done by the party aggrieved; but in public nuisances the right is more confined. They may be abated by boards of health and other public bodies specially authorised under various public acts (*a*); but a private individual cannot resort to this course unless the nuisance does him a special injury, or if the abatement involves a breach of the peace; and in any case he can only interfere so far as is necessary to exercise the right of passing, &c. (*b*).

Local sanitary authorities are empowered to require a person by whose act or default a nuisance arises or continues, to abate the same within a specified time, and to execute such works as may be necessary for that purpose (*c*). If this requirement is not complied with complaint may be made to the justices, and an order obtained to abate the nuisance, and imposing a penalty (*d*). If the order is disobeyed, further penalties are incurred, and power is given to the sanitary authority to abate the nuisance, and recover from the offender any expense occasioned thereby (*e*).

The principal classes of public nuisances will be briefly noticed :

i. Nuisances to *highways, bridges, and public rivers*.—*Nuisances to highways, &c.* These annoyances may be either *positive*, by actual obstruction; or *negative*, by want of reparation. In the latter case, only those persons are liable whose duty it is to keep the roads, &c., in repair. The former class consists of a variety of offences, for example, laying

(*a*) v. 38 & 39 Vict. c. 55.

(*c*) 38 & 39 Vict. c. 55, s. 94.

(*b*) *Dimes v. Petley*, 15 Q. B. 276.

(*d*) *Ibid.* s. 96.

(*e*) *Ibid.* s. 98.

rubbish on the road, digging trenches in it, &c. (a); assembling or attracting a crowd (b); or diverting part of a public river, polluting with refuse matter or interfering with the due course of streams, &c. (c).

Offensive
trades, &c.

ii. *Carrying on offensive or dangerous trades or manufactures.*—Manufactures which are injurious to the health, or so offensive to the senses as to detract sensibly from the enjoyment of life and property in their neighbourhood, are nuisances; and it is no defence that the public benefit outweighs the public annoyance (d). But if a noxious trade is already established in a place remote from habitations and public roads, and persons come and build near, or a new road is made, it has been held that the trade may be continued (e). The presence of other nuisances will not justify any one of them; but a person cannot be indicted for setting up a noxious manufacture in a neighbourhood in which other offensive pursuits have long been borne with, unless the inconvenience to the public is greatly increased (f). No length of time will legitimate this or other kinds of public nuisances, but the consideration of time may sometimes concur with other circumstances to prevent the character of nuisance from attaching (g).

The manufacture, sale, carrying, and importation of gunpowder, nitro-glycerine, and other explosive substances are regulated by the Explosives Act, 1875 (38 & 39 Vict. c. 17), which contains stringent regulations as to the carrying on of those trades.

If the nuisance has been created by works which have been sanctioned by an Act of Parliament, no prosecution can be instituted with respect to it, provided the works

(a) 5 & 6 Will. 4, c. 50.

(b) *R. v. Carlile*, 6 C. & P. 636.

(c) 39 & 40 Vict. c. 75.

(d) *R. v. Ward*, 5 L. J. (K.B.) 221.

(e) *R. v. Cross*, 2 C. & P. 483. But this must not be regarded as absolutely settled law, and certainly in some such cases the newcomers would have a right of civil action. See *Hole v. Barlow*, 4 C. B. (N. S.) at p. 336; 27 L. J. (C.P.) 208; and *Bliss v. Hall*, 4 Bing. N. C. 183.

(f) *R. v. Neil*, 2 C. & P. 485; v. *R. v. Neville*, Peake, 91.

(g) *Weld v. Hornby*, 7 East, 199.

have been carried out in strict conformity with the Act, and all reasonable precautions have been taken to prevent injury (a).

Nuisances which affect the public health are dealt with in the numerous statutes which treat of that subject, and have already been referred to.

iii. *Houses, &c., which interfere with public order and decency.*—The following places are nuisances, and, upon indictment, may be suppressed, and their owners, keepers, or ostensible managers punished by fine or imprisonment, or both: Disorderly inns (b) or alehouses; bawdy houses (c); gaming and betting houses (d); unlicensed or improperly conducted playhouses, booths, stages for dancers, and the like. Houses, as nuisances.

Prosecutions for keeping a bawdy house or gaming house fall within the provisions of the Vexatious Indictments Act (e).

iv. *Lotteries.*—All lotteries were declared by statute (f) Lotteries. public nuisances. A lottery is a distribution of prizes by lot or chance, *e.g.*, selling packets containing half a pound of tea and a coupon for something of uncertain value constitutes a lottery (g). But if the competition for prizes is decided by skill or judgment, although the skill required may be small, such a competition does not amount to a lottery (h). State lotteries were, however, authorised by successive Acts of Parliament until 1824, when they were discontinued, the State being thus enabled without inconsistency to enforce the already existing law against other lotteries.

(a) *R. v. Pease*, 4 B. & Ad. 30; *Hammersmith, &c., Railway Co. v. Brund*, L. R. 4 H. L. 171.

(b) If a traveller is refused entertainment without sufficient cause, the inn is liable to be treated as a disorderly inn.

(c) 25 Geo. 2, c. 36, s. 8; 3 Geo. 4, c. 114; 48 & 49 Vict. c. 69, s. 13.

(d) v. pp. 123, 124.

(e) v. p. 350.

(f) 10 & 11 Wm. 3, c. 17. See also 42 Geo. 3, c. 119, s. 2.

(g) *Taylor v. Smetten*, L. R. 11 Q. B. D. 207; 52 L. J. (M.C.) 100.

(h) *Barclay v. Pearson*, L. R. [1893] 2 Ch. 154; *Stoddart v. Sagar*, L. R. [1895] 2 Q. B. 474; 64 L. J. (M.C.) 234; 73 L. T. 215; 44 W. R. 287.

**Miscellaneous
nuisances.**

v. A vast number of other acts, &c., have been declared public nuisances; for example, exposing in a public thoroughfare persons afflicted with infectious diseases; allowing mischievous dogs to go abroad unmuzzled, the owner being aware of their nature; keeping fierce animals in places open to the public; keeping hogs near a public street; keeping a corpse unburied if the defendant has the means of providing burial (*a*); or disposing of it by burning or otherwise so as to cause a public nuisance (*b*); or with a view to prevent an inquest being held upon it (*c*); removing, without lawful authority and from whatever motive, a corpse from a grave (*d*); making great noises in the street at night; eavesdropping, that is "listening under walls or windows, or the eaves of a house, to hearken after discourse, and thereby to frame slanderous and mischievous tales;" common scolds; and in general anything which is an appreciable grievance to the public at large.

Who is liable.

There are two cases at least where there might be a doubt as to the person who is criminally responsible for a nuisance. A landlord is liable if he erects a building which is a nuisance, or the occupation of which is likely to produce a nuisance. A master or employer is liable for a nuisance caused by the acts of his servants if done in the course of their employment, even though those acts are done without his knowledge and contrary to his general orders (*e*).

ADULTERATION AND UNWHOLESOME PROVISIONS.

Obviously there is no undue interference on the part of the State when it characterises as a crime the adulterating food or dealing in unwholesome provisions, and

(*a*) *R. v. Vann*, 2 Den. C. C. 325.

(*b*) *R. v. Price*, L. R. 12 Q. B. D. 247.

(*c*) *R. v. Stephenson*, L. R. 13 Q. B. D. 331; 53 L. J. (M.C.) 176; 52 L. T. 267; 33 W. R. 244; Warb. L. C. 118.

(*d*) *R. v. Sharpe*, 26 L. J. (M.C.) 47; D. & B. 160.

(*e*) *R. v. Stephens*, L. R. 1 Q. B. 702; 35 L. J. (Q. B.) 251; 14 L. T. 593; 14 W. R. 859; Warb. L. C. 35.

the exposing for sale of meat unfit for food has always been indictable at common law as a nuisance.

The modern law as to *adulteration* is contained chiefly in the Sale of Food and Drugs Act, 1875 (*a*). Mixing, or ordering, or permitting other persons to mix, colour, &c., any article of food with any material injurious to health, with intent that the same may be sold in that state, is punishable for the first offence by a penalty of £50; the second offence is a misdemeanor, punishable by imprisonment not exceeding six months (*b*). The same consequences attend the adulteration of drugs, so as to affect injuriously the quality or potency of such drugs (*c*). In either case the person is excused if he can prove absence of knowledge of the adulteration, and that he could not with reasonable diligence have obtained that knowledge. He is also to be discharged if he can prove that he bought the article in the same state as he sold it, with a warranty (*d*). Other punishments are prescribed for giving false warranties, false labels, forging certificates, or warranties, &c. (*e*). Adulteration,
&c.

There are other minor offences in connection with the sale of food, &c., viz., selling to the prejudice of the purchaser any article of food, or any drug, which is not of the nature, substance, or quality of the article demanded by such purchaser (*f*); abstracting from an article of food so as to affect injuriously its quality, substance, or nature, with the intent that the same may be sold in its altered state without notice thereof (*g*), the penalty in each case being £20.

In a prosecution under this enactment for selling any article of food, or any drug, which is not of the nature, substance, or quality demanded by the purchaser, it is not necessary to prove guilty knowledge on the part of

(*a*) 38 & 39 Vict. c. 63, which applies equally to the case of a purchase by a private individual under section 12 and by the public officer mentioned in section 13 of the Act. *Parsons v. The Birmingham Dairy Company*, L. R. 9 Q. B. D. 172; 51 L. J. (M.C.) 111; 30 W. R. 748.

(*b*) 38 & 39 Vict. c. 63, s. 3.

(*c*) *Ibid.* s. 4.

(*d*) *Ibid.* s. 25.

(*e*) *Ibid.* s. 27.

(*f*) *Ibid.* s. 6.

(*g*) *Ibid.* s. 9.

the seller (*a*). But the absence of such a guilty knowledge would be a defence to a charge of adulteration under the third or fourth sections of the Act, and also to a charge of giving a false warranty under the twenty-seventh section (*b*).

**Powers of
inspectors.**

Medical officers and inspectors of nuisances are empowered by the Public Health Act, 1875, to inspect and examine any animal, meat, fish, vegetables, corn, bread, milk, &c., sold or exposed for sale, or in course of preparation for sale, and intended for the food of man, and, if they consider the same diseased, unsound, or unfit for food, to seize and carry it away so as to be dealt with by a justice, who may order it to be destroyed, and may also punish the person to whom it belongs or on whose premises it was found by a penalty of £20 for every animal, &c., so condemned, or by imprisonment (without fine) for a term not exceeding three months (*c*).

Seeds.

The adulteration and killing of seeds is punishable by a fine of £5 for the first and £50 for a subsequent offence (*d*).

Beer.

The adulteration of beer is forbidden under a penalty of £50 (*e*).

Butter.

There are also special statutory provisions as to butter, and the sale of margarine (*i.e.*, any substance prepared in imitation of butter) is only allowed provided the conditions imposed by the Margarine Act (*f*) are complied with. These conditions require, amongst other things, that all cases and packages containing margarine should be conspicuously marked with that word. The penalties for infringing this Act are £20

(*a*) *Betts v. Armstead*, L. R. 20 Q. B. D. 771; 57 L. J. (M.C.) 100; 58 L. T. N. S. 811; 36 W. R. 720.

(*b*) *Derbyshire v. Houlston*, 18 Cox C. C. 609.

(*c*) 38 & 39 Vict. c. 55, ss. 116-119; 53 & 54 Vict. c. 59, s. 28.

(*d*) 32 & 33 Vict. c. 112.

(*e*) 48 & 49 Vict. c. 51, s. 8.

(*f*) 50 & 51 Vict. c. 29.

for the first offence, £50 for the second, and £100 for subsequent offences.

FACTORIES, WORKSHOPS, AND MINES.

By the Factory and Workshop Act, 1878 (*a*), many Factories, &c. regulations are made as to the sanitary arrangements of such buildings, the safety of machinery, &c., used therein, the periods of employment of children and women, the education of children, accidents and many other matters as to which the reader is referred to the statute. Pecuniary penalties (and in some cases imprisonment) are imposed for breaches of these regulations. There are also statutes containing similar provisions with regard to mines (*b*).

WANTON AND FURIOUS DRIVING.

Any one having the charge of any carriage or vehicle, Furious driving. who, by wanton or furious driving or racing, or by wilful misconduct, or by wilful neglect, causes any bodily harm to another, is guilty of a misdemeanor, and is liable to imprisonment not exceeding two years, or fine, or both (*c*).

VAGRANCY.

There are always in this country a great number of Vagrancy. persons who, without making any attempt to earn a livelihood, make it their habit and mode of life to wander about begging and otherwise misconducting themselves. The law punishes such as *vagrants* (*d*), taking care that mere misfortune or poverty does not place an innocent person in this class. The chief statute on the subject is 5 Geo. 4, c. 83, amended by 1 & 2

(*a*) 41 Vict. c. 16; v. also 54 & 55 Vict. c. 75, and 58 & 59 Vict. c. 37.

(*b*) As to coal mines, 50 & 51 Vict. c. 58; 59 & 60 Vict. c. 43. As to metalliferous mines, 35 & 36 Vict. c. 77. As to the employment of young persons under eighteen in shops or warehouses, 55 & 56 Vict. c. 62.

(*c*) 24 & 25 Vict. c. 100, s. 35.

(*d*) *Pointon v. Hill*, 53 L. J. (M.C.) 62; 15 Cox, 461.

Vict. c. 38 ; other acts render liable to the punishments of these statutes those who evidence their culpability by certain kinds of conduct.

Persons of this character are divided into three classes :—1. Idle and disorderly persons ; 2. Rogues and vagabonds ; 3. Incurrible rogues.

Idle and disorderly persons.

1. *Idle and Disorderly Persons*.—This class consists of such characters as the following :—(a) Persons becoming chargeable to the parish though able to work ; (b) Those returning to and becoming chargeable on a parish from which they have been legally removed by justices ; (c) Hawkers and pedlars wandering about and trading without licence ; (d) Prostitutes behaving in public places in a riotous or indecent manner ; (e) Beggars asking alms or causing or encouraging any children to do so (a) ; (f) Insubordinate or disobedient paupers (b).

The punishment, on conviction before a magistrate for the first offence, is imprisonment for a period not exceeding one month (c).

Rogues and vagabonds.

2. *Rogues and Vagabonds*.—Under this designation fall (a) those who commit any of the above offences a second time. Also the following : (b) Persons pretending to tell fortunes, &c. ; (c) Wandering about, lodging in a barn, in the open air, &c., not having any visible means of subsistence, and not giving a good account of themselves ; (d) Publicly exposing to view obscene prints, &c. ; (e) Publicly exposing their persons ; (f) Exposing wounds or deformities in order to obtain alms ; (g) Collecting alms or contributions of any kind under false pretences ; (h) Running away and leaving wife or children chargeable to the parish ; (i) Gaming or betting in public (d) ; (k) Having in possession one or more of certain instruments with intent to commit a

(a) 5 Geo. 4, c. 83, s. 3. But begging for a special occasion is not within this Act, *Pointon v. Hill*, 53 L. J. (M.C.) 62 ; 15 Cox, 461.

(b) 34 & 35 Vict. c. 108, s. 7.

(c) 5 Geo. 4, c. 83, s. 3.

(d) 36 & 37 Vict. c. 38, v. p. 123.

felonious act; (l) Being found in a dwelling-house, &c., for an unlawful purpose; (m) Suspected or reputed thieves frequenting or loitering about public places with intent to commit a felony (a); (n) Making violent resistance when apprehended by a peace officer as an idle and disorderly person, provided he be convicted as such; (o) Acting contrary to directions of certificates given to persons discharged from prison under 5 Geo. 4, c. 83, s. 15 (b); (p) And by a recent statute (c) every male person who knowingly lives wholly or in part on the earnings of prostitution or who in a public place persistently solicits or importunes for immoral purposes is to be deemed and dealt with as a rogue and vagabond.

The punishment which may be awarded by the magistrate is imprisonment not exceeding three months. In this case, and that of imprisonment as an idle and disorderly person, there is an appeal to quarter sessions (d).

3. *Incorrigible Rogues*.—To be dealt with as such are ^{Incorrigible rogues.} (a) Those who are convicted a second time of an act which makes the doer a rogue and vagabond; (b) Escaping out of a place of confinement before the expiration of the time for which they were committed under this Act; (c) Making violent resistance when apprehended by a peace officer as a rogue and vagabond, if subsequently convicted of the offence for which they were apprehended (e).

The magistrate may commit a person convicted as an incorrigible rogue to hard labour in the House of Correction until the next quarter sessions. By that court he may be imprisoned for a period not exceeding one year (f).

(a) 5 Geo. 4, c. 83, s. 4; 33 & 34 Vict. c. 112, s. 15; 54 & 55 Vict. c. 69, s. 7.

(b) 5 Geo. 4, c. 83, s. 4.

(c) 61 & 62 Vict. c. 39.

(d) 5 Geo. 4, c. 83, ss. 4, 14.

(e) 5 Geo. 4, c. 83, s. 5.

(f) *Ibid.* s. 10. Though *drunkenness* is not an indictable offence, but only punishable on summary conviction, the subject may have a passing

SENDING UNSEAWORTHY SHIPS TO SEA.

Sending unseaworthy ships to sea.

Every person who sends or attempts to send, or is a party to sending or attempting to send, a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, is guilty of a misdemeanor (*a*).

The master of a British ship knowingly taking her to sea in such an unseaworthy state is also guilty.

Defence.

But the accused will not be deemed guilty if he proves in the former cases that he has used all reasonable means to ensure the ship being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable; in the case of the master, if he proves the latter of these points.

The consent of the Board of Trade is necessary before the institution of any prosecution for this offence (*b*).

NEGLECT OF DUTY BY MASTERS, ETC., OF SHIPS.

Neglect to conform with regulations as to lights, &c.

Owners and masters of ships are bound to conform with the regulations as to lights and sailing rules prescribed by the Merchant Shipping Act Amendment Act, 1894, and in case of wilful default the person offending is guilty of a misdemeanor (*c*).

notice here. Persons found drunk in any street or public thoroughfare, building, or other place, or on any licensed premises, are liable to a penalty of 10s. for the first offence; 20s. and 40s. for the second and third within the twelve months. If, whilst drunk, a person is guilty of riotous or disorderly behaviour, or is in charge of any carriage, horse, cattle, or steam-engine, or is in possession of any loaded fire-arms, the penalty is 40s., or imprisonment for a month (35 & 36 Vict. c. 94, s. 12). The same Act contains penalties upon publicans for permitting drunken conduct; v. also 10 & 11 Vict. c. 89. As to the detention in an inebriate reformatory of criminal habitual drunkards, v. p. 461.

(*a*) 57 & 58 Vict. c. 60, s. 457.

(*b*) The same Act provides heavy pecuniary penalties for overloading sea-going ships.

(*c*) 57 & 58 Vict. c. 60, s. 419.

It is also a misdemeanor for the master or person in charge of a vessel to fail, without reasonable cause, to stand by another vessel with which his own has come into collision, or to render all necessary assistance to the passengers and crew, or to give to the master of the other vessel the name of his own vessel (a). Neglect to assist in case of collision.

(a) 57 & 58 Vict. c. 60, s. 422.

CHAPTER IX.

OFFENCES RELATING TO GAME.

Live game not
the subject of
property.

WE proceed to treat of poaching and the attendant offences. We shall find hereafter that animals *feræ naturæ* (including game) in their live state are not the property of any one, and on this account are not the subjects of larceny. The legislature has, however, made special provisions for their protection.

Night poach-
ing.

Night poaching is treated as a much more serious offence than poaching by day.

The principal statute on the subject is 9 Geo. 4, c. 69, amended by 7 & 8 Vict. c. 29 and 25 & 26 Vict. c. 114. The following are the chief offences:

Taking, &c.,
game by night.

i. Any person by night (declared to commence one hour after sunset, and to conclude at the beginning of the last hour before sunrise) (*a*) unlawfully *taking* or *destroying* any game (hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards), or rabbits, in any land open or enclosed (*b*), or on public roads, highways, gates, outlets, or openings between such lands and roads (*c*).

Entering, &c.,
for purpose of
taking.

ii. Any person *entering* or *being* by night in such places, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game (*d*).

Punishment.

The punishment for the *first* offence in each case is imprisonment not exceeding three months, and at the expiration of such period to be bound over to good beha-

(*a*) 9 Geo. 4, c. 69, s. 12.
(*c*) 7 & 8 Vict. c. 29, s. 1.

(*b*) *Ibid.* s. 1.
(*d*) 9 Geo. 4, c. 69, s. 1.

viour for a year, or, in default of sureties, further imprisonment not exceeding six months, or until such sureties be found. For the *second*, likewise summarily dealt with, each of the above periods is doubled. The *third* offence is a misdemeanor, punishable by penal servitude to the extent of seven years (a).

When any person is found committing such offence, it is lawful for the owner or occupier of the land (or in the case of a public road, &c., of the adjoining land), or for any person having the right of free warren or free chase therein, or for the lord of the manor, or for the gamekeeper or servant of such persons, or for any one assisting them to apprehend the poacher. If the latter assaults or offers any violence with an offensive weapon to such person, he is punishable for the misdemeanor with penal servitude to the extent of seven years (b).

Apprehension
of offender.

A graver offence is dealt with in a later section of the same statute. For *three* or more persons, by night, to unlawfully enter, or be in any land (or road, &c., 7 & 8 Vict. c. 29), for the purpose of taking or destroying game or rabbits, any of the party being *armed* with firearms or other offensive weapons, is a misdemeanor in each, punishable by penal servitude to the extent of fourteen years (c). It should be observed that all of the party may be convicted of this offence if any of them be armed to the knowledge of the others (d). Sticks and large stones are arms within the meaning of the Act, if the jury is satisfied that they were taken with the object of being used as such, and were of such a nature that they might, if used, cause serious injury (e).

Three or more
armed for
purpose of
taking game.

The prosecution for every offence within this Act, if punishable on summary conviction, must be commenced within six months after the offence; if punishable by

(a) 9 Geo. 4, c. 69, s. 1.

(b) *Ibid.* s. 2.

(c) *Ibid.* s. 9.

(d) *R. v. Smith*, R. & R. 386; *R. v. Southern*, R. & R. 444.

(e) *R. v. Sutton*, 13 Cox, 648; Warb. L. C. 213.

indictment or otherwise than by summary conviction, within twelve months (*a*).

Any person may arrest those who are found committing the last-mentioned offence (*b*).

Search for
game, guns,
&c.

Power is given to the police to search in public places persons suspected on reasonable grounds of coming from lands where they have been unlawfully in pursuit of game, and their carts, and to seize any game, guns, &c., which they may have in their possession. The persons so searched are to be brought before two magistrates assembled in petty sessions, and, if they are convicted, forfeit the goods, and are fined a sum not exceeding £5 (*c*).

Hares and
rabbits.

Unlawfully taking or killing *hares* or *rabbits* in warren by *night* is a misdemeanor; by *day*, an offence punishable by a fine of £5 on summary conviction (*d*).

Deer.

By the same statute, hunting, killing, &c., *deer* in an unenclosed part of a forest is punishable on the first offence by penalty not exceeding £50; on the second, which is a felony, by imprisonment not exceeding two years. The latter punishment applies to even a first offence, if committed in an enclosed part (*e*).

The law as to day poaching is principally contained in the Act 1 & 2 Wm. IV. c. 32. That Act provides close seasons for the various kinds of game. By sec. 30 persons trespassing by day in pursuit of game or rabbits are liable to a fine of £2, or £5 each if five or more go together for that purpose.

Poaching fish in private waters is punishable under 24 & 25 Vict. c. 96, s. 24, by a fine.

By 43 & 44 Vict. c. 35, and 44 & 45 Vict. c. 51, a close time is appointed for most kinds of wild birds, and

(*a*) 9 Geo. 4, c. 69, s. 4.

(*b*) 14 & 15 Vict. c. 19, s. 11; *R. v. Sanderson*, 1 F. & F. 598.

(*c*) 25 & 26 Vict. c. 114, s. 2.

(*d*) 24 & 25 Vict. c. 96, s. 17.

(*e*) *Ibid.* ss. 12, 13.

the destruction of such birds or their eggs during the close season is punishable by fine.

In connection with this subject it may be noticed that, ^{Spring-guns, &c.} although any innocent means may be employed to prevent game from being taken, and land from being trespassed on, it is criminal to adopt certain extreme measures. Setting a *spring-gun*, man-trap, or other engine calculated to destroy life, or inflict grievous bodily harm, with intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, is a misdemeanor punishable by penal servitude to the extent of five years. But this does not prevent setting a man-trap, &c., to protect a dwelling-house from sunset to sunrise (a).

(a) 24 & 25 Vict. c. 100, s. 31.

PART II.

OFFENCES AGAINST INDIVIDUALS.

OFFENCES which immediately affect individuals are regarded as crimes, and not merely as violations of private rights, on several grounds. First, because they are considered as contempts of public justice and the Crown; secondly, because they almost always include in them a breach of the public peace; thirdly, because, by their example and evil tendency, they threaten and endanger the subversion of all civil society (*a*).

Offences against individuals may be divided into two classes—those

Against their *Persons*.

Against their *Property*.

(*a*) 4 Bl. 176.

OFFENCES AGAINST INDIVIDUALS— THEIR PERSONS.

CHAPTER I.

HOMICIDE.

HOMICIDE—the destroying of the life of a human being— Homicide. includes acts varying from those which imply no guilt at all, to those which deserve and meet with the extreme punishment of the law. Three kinds of homicide are usually distinguished, each class admitting of subdivision :

Justifiable : Excusable : Felonious.

It may be stated at the outset that if the mere fact of the homicide is proved, the law presumes the malice Presumed to be felonious. which is necessary to make it amount to murder ; and, therefore, it lies on the accused to show that the killing was justifiable or excusable, or that it only amounted to manslaughter (a).

Justifiable Homicide, that is, where no guilt, nor even Justifiable homicide. fault, attaches to the slayer.—For one species of homicide the term “justifiable” seems almost too weak, inasmuch as not only is the deed justifiable, but also obligatory. Three cases of justifiable homicide are recognised :—

i. Where the proper officer executes a criminal, in Execution of a criminal. strict conformity with his legal sentence. A person other than the proper officer (*i.e.*, the sheriff or his

(a) *R. v. Greenacre*, 8 C. & P. 35.

deputy) who performs the part of an executioner is guilty of murder. The criminal must have been found guilty by a competent tribunal; so that it would be murder otherwise to kill the greatest of malefactors. The sentence must have been legally given; that is, by a court or judge who has authority to deal with the crime. If judgment of death is given by a judge who has not authority, and the accused is executed, the judge is guilty of murder. The sentence must be strictly carried out by the officer (*i.e.*, the sentence as it stands after the remission of any part which the sovereign thinks fit), so that if he beheads a criminal whose sentence is hanging or *vice versa*, he is guilty of murder. Though the sovereign may remit a part of the sentence, he may not change it (*a*).

The two following instances of justifiable homicide are permitted by the law as necessary; and the first, at least, for the advancement of public justice.

Homicide by
one resisted in
the execution
of his duty.

ii. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. Homicide is justifiable on this ground in the following cases (*b*): (*a*) When a peace officer or his assistant, in the due execution of his office, whether in a civil or criminal case, kills one who is resisting his arrest or attempt to arrest. (*b*) When prisoners in gaol, or going to gaol, assault the gaoler or officer, and he, in his defence, to prevent an escape, kills any of them. (*c*) When an officer, or private person, having legal authority to arrest, attempts to do so, and the other flies, and is killed in the pursuit. But here the ground of the arrest must be either a felony or the infliction of a dangerous wound, and it must be shown that the criminal could not be arrested without killing him. (*d*) When an officer, in endeavouring to disperse the mob in a riot or rebellious assembly, kills one or more of them, he not being able otherwise to suppress the riot. In this case

(*a*) Except in the case of treason; as to which v. p. 44.

(*b*) v. 4 Bl. 179.

the homicide is justifiable both at common law and by the Riot Act (*a*).

In all these cases, however, it must be shown that the killing was apparently a necessity. }

But it is not difficult to instance cases in which the officer would be guilty, (*a*) of *murder*, for example, if the killing in pursuit as above were in case of one charged with a misdemeanor only, or of one arrested merely in a civil suit (*b*); (*b*) of *manslaughter*, for example, if the killing in case of one so charged with a misdemeanor were occasioned by means not likely to kill, as by tripping up the fugitive's heels.

iii. When the homicide is committed in *prevention* of a forcible and atrocious crime. Such crimes, it is said, ^{Homicide in the prevention of crime.} are the following:—Attempting to rob or murder another in or near the highway, or in a dwelling-house; or attempting to break into a dwelling-house with intent to rob. In such cases, not only the owner, his servants and members of his family, but also any strangers present, are justified in killing the assailant. But this justification does not apply to felonies without force, *e.g.*, pocket-picking; nor to misdemeanors, save that in defence of a man's house the owner or his family may kill a trespasser trying forcibly to dispossess him of it (*c*).

A woman is justified in killing one who attempts to ravish her; and so, too, the husband or father may kill a man who attempts a rape on his wife or daughter, if she do not consent. And even if the adultery is by the consent of the wife, the husband taking the offender in the act and thereupon killing him is guilty of manslaughter only. But in the latter case, if the killing were deliberate and in revenge after the fact the crime would be murder (*d*).

(*a*) 1 Geo. 1, st. 2, c. 5.

(*b*) *R. v. Dadson*, 20 L. J. (M.C.) 57.

(*c*) 1 Hale, 485, 486; *R. v. Symondson*, 60 J. P. 645.

(*d*) 1 East, P. C. 234, 251; *R. v. Maddy*, 1 Vent. 158; *R. v. Fisher*, 8 C. & P. 182; Warb, L. C. 97.

It is said that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but he may even pursue the assailant until he finds himself or his property out of danger (*a*). But this will not justify a person firing upon every one who forcibly enters his house, even at night. He ought not to proceed to the last extremity until he has taken all other possible steps to prevent the crime which is being attempted (*b*).

Excusable
homicide.

Excusable Homicide.—It may perhaps be doubted whether there is any substantial ground for the distinction between justifiable and excusable homicide. Perhaps there may be something in this, that in the former case the killer is engaged in an act which the law enjoins or allows *positively*, while in the latter he is about something which the law *negatively* does not prohibit. In neither case is there the malice which is an essential of a crime. In former times, a very substantial difference was made between the two kinds of homicide. That styled “excusable” did not imply that the party was altogether excused; so much so that Coke says (*c*) that the penalty was death. But the earliest information which the records supply shows that the defendant received a complete pardon, and the restitution of his goods; but he had to pay a sum of money to procure this award. Now it is expressly declared by statute (*d*) that no forfeiture or punishment shall be incurred by any person who kills another by misfortune or in self-defence, or in any other manner without felony.

The two kinds of so-called excusable homicide are homicide in self-defence; homicide by accident or misfortune.

Homicide *se*
defendendo.

i. *Se defendendo*, upon sudden affray. —We have noticed above the case of a man killing another when

(*a*) Fost. 273.

(*b*) *R. v. Bull*, 9 C. & P. 22.

(*c*) 2 Inst. 148, 315.

(*d*) 24 & 25 Vict. c. 100, s. 7, re-enacting 9 Geo. 4, c. 31, s. 10.

the latter is engaged in the performance of some forcible crime. What we have now to deal with is a kind of self-defence, the occasion of which is more uncertain in its origin, and in which it seems natural to impute some moral blame to both parties. It happens when a man kills another, upon a sudden affray, in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling. This is one species of what is called *chance* (casual) or *chaud* (in heat) *medley*.

To bring the killing within this excuse, the accused must show that he endeavoured to avoid any further struggle, and retreated as far as he could, until no possible, or at least probable means of escaping remained; that then, and not until then, he killed the other in order to escape destruction. It matters not that the defendant gave the first blow, if he has terminated his connection with the affray by declining further struggle before the mortal wound is given. To excuse the mortal stroke it must be made while the danger is imminent; for if the struggle is over, or the other is running away, this is revenge and not self-defence. Nor will a retreat of the nature indicated avail if the blow is the result of a concerted design; as in the case of a duel, where the two parties have agreed to meet each other, and one, having retreated as far as he can, kills the other in protection of himself. Nor will it avail if there has been a blow from malice *premeditated*, and the striker, with a view to excuse himself, has retreated and then killed the other in his own defence (a).

What is self-defence.

As the definition shows, the killing in defence of those standing in the relation of husband and wife, parent and child, master and servant, is excused; the act of such person who interferes being construed as the act of the party himself.

Under circumstances which induced the belief that a

(a) Ecst. 277; 1 Hale, P. C. 482.

man was cutting the throat of his wife, their son shot and killed his father; it was held that if the accused had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable (a).

Distinction
between
homicide *ex*
defendendo and
manslaughter.

The distinction between this kind of homicide and manslaughter is that in the former case the accused has done all that he can to avoid the struggle or its continuation; in the latter he has not.

It should be observed that a man has no right to sacrifice an innocent and unoffending person by killing him, even if it affords the only chance of saving his own life. If he does so he is guilty of murder (b).

Homicide *per*
infortunium.

ii. *Per infortunium*, by misadventure.—When a person doing a lawful act, without any intention of hurt, by accident kills another: as, for example, a man is at work with a hatchet, the head flies off by accident, and kills a bystander.

The act must
be lawful,

To bring the slaying within the protection of the excuse, the act about which the slayer is engaged must be (a) a lawful one. For if the slaying happen in the performance of an illegal act it is manslaughter at least; and murder, if such act was a felony (c), unless the act was one which could not of itself be likely to cause any danger to life. It must also (b) be done in a proper manner. Thus it is a lawful act for a parent to chastise his child, and therefore if the parent happens to occasion the death of the child, if the punishment is moderate, the parent will be innocent as *per infortunium*. But if the correction exceeds the bounds

done in a
proper
manner,

(a) *R. v. Rose*, 15 Cox, 540.

(b) *R. v. Dudley*, L. R. 14 Q. B. D. 273; 54 L. J. (M.C.) 39; 52 L. T. (N. S.) 107; Warb. L. C. 88.

(c) *v. R. v. Hodgson*, 1 Leach, 6. There is no doubt authority for saying that killing in the course of the commission of *any* felony is murder, whether the act was one likely to cause death or not. But the qualification given in the text is in conformity with the more modern opinion and the mode in which juries are now usually directed. *v. R. v. Serné*, 16 Cox, 311.

of moderation, either in the manner, the instrument, or the quantity of the punishment, and death ensues, it is manslaughter at the least, and in some cases murder. Thus it will as a rule, be murder if the instrument used is one likely to cause death; manslaughter, if the instrument is not of such a character, though an improper one (a).

The act must also (c) be done with due caution to prevent danger; and therefore with more caution by those using dangerous instruments or articles. Due caution is such as to make it improbable that any danger or injury should arise from the act to others. Thus, if a workman throw stones or rubbish from a house, whereby the death of some one is caused, it may be murder, manslaughter, or homicide by misadventure: murder, if the thrower knew that people were passing, and gave no notice; manslaughter, if at a time when it was not likely that any people were passing; excusable homicide, if in a retired place where persons were not in the habit of passing or likely to pass (b). It has been said that to be criminal the negligence must be so gross as to be reckless (c), but it is impossible to exhaustively define culpable or criminal negligence.

SUICIDE OR SELF-MURDER.

Suicide is a felony if the act be committed deliberately, and by one who has arrived at years of discretion and is in his right mind. The supposed absence of the last requisite is often taken advantage of by a coroner's jury in order to save the reputation of the deceased.

Not only is he guilty of suicide who, in pursuance of a fixed intention, takes away his life, but also he who, maliciously attempting to kill another, occasions his own

(a) *R. v. Hopley*, 2 F. & F. 202; Warb. L. C. 96; *R. v. Griffin*, 11 Cox, C. C. 402; *R. v. Cheesman*, 7 C. & P. 455.

(b) Fost. 262; 3 Inst. 57.

(c) *R. v. Noakes*, 4 F. & F. 921, n.

death: as where a man shoots at another, and, the gun bursting, he kills himself. But if a man is killed at his own request by the hand of another, the former is not deemed in law a *felo de se*, though the latter is a murderer.

If one persuades another to kill himself, and he does so, the adviser is guilty of murder. So, also, if two persons agree to commit suicide together, if one escapes and the other dies, the survivor is guilty of murder (*a*).

Punishment.

At one time the punishment for this crime was an ignominious burial in the highway, without Christian rites, with a stake driven through the body; and the forfeiture of all the deceased's goods and chattels to the Crown. But some time back the law was altered, the only consequence now being the denial of the right of Christian burial (*b*). The forfeiture has been done away with in this as well as in other kinds of felony (*c*).

Attempted suicide.

An attempt to commit suicide is not an attempt to commit murder within the Offences against the Person Act (*d*), but still remains a common law misdemeanor punishable by fine or imprisonment.

Felonious killing of another.

The felonious killing of *another* is either murder or manslaughter. In dealing with the crime of murder, we shall anticipate, to some extent, the law of manslaughter, a great part of the law on the subject consisting in a distinction of the two crimes.

MURDER.

Definition of murder.

We may adopt Coke's definition of murder for the purpose of explaining the crime. "When a person of sound memory and discretion unlawfully killeth any

(*a*) *R. v. Stormouth*, 61 J. P. 729.

(*b*) 45 & 46 Vict. c. 19.

(*d*) 24 & 25 Vict. c. 100. s. 15.

(*c*) 33 & 34 Vict. c. 23, s. 1.

reasonable creature in being and under the king's peace with malice aforethought, either express or implied" (a).

(a) *The offender must be of sound memory and discretion.*—Thus are excluded all idiots, lunatics, and young children, in accordance with the rules as to capability of committing crimes which have already been set forth (b). Of course the person procuring an idiot to commit murder, or, indeed, any crime, is guilty himself of the crime. The sanity, &c., of the offender.

(b) *Unlawfully killeth*, that is, kills without justification or excuse.—As we have seen, the presumption is against the accused, and it is for him to purge the act of its felonious character by proving such justification or excuse. The unlawful killing.

It is perfectly immaterial what may be the particular form of death, whether poisoning, striking, starving, drowning, or any other (c). Any act, the probable consequence of which may be, and eventually is, death, is murder, though no stroke be struck, and, what is more noticeable, though the killing be not primarily intended; for example, where a mother hid her child in a pig-sty, where it was devoured (d). So if one, being threatened and under a well-grounded apprehension of personal violence which would endanger his life, does an act which causes his death, as for instance, jumps out of a window, he who threatens is answerable for the consequences as if he had himself thrown the deceased out of window (e). A person may also be guilty of murder through mere non-feasance; as if it was his duty and in his power to supply food to a child unable to provide for itself, and the child died because no food was supplied (f). The form of death.

It is no defence to show that the deceased was in ill- The cause of death.

(a) 3 Inst. 47.

(b) v. p. 16 *et seq.*

(c) As to swearing away a man's life, v. p. 73, n.

(d) 1 Hale, P. C. 433.

(e) *R. v. Evans*, 1 Russ. 651; *R. v. Pitts*, C. & Mar. 284.

(f) v. *R. v. Marriott*, 8 C. & P. 425.

The time of death.

health and likely to die when the wound was given (a). Nor is it a defence that the immediate cause of death was neglect or the refusal of the party to submit to an operation; though it would be otherwise if the death were caused by improper applications to the wound, and not by the wound itself (b). To make the killing murder the death must follow within a year and a day after the stroke or other cause; for if the death is deferred beyond that length of time the law will presume that it arose from some other cause.

Finding of the body.

It is a rule of long standing that upon merely circumstantial evidence a man is not to be convicted of murder or manslaughter unless the body of the person alleged to have been killed has been found (c). But this is not absolutely necessary where the *direct* evidence brought before the jury is sufficiently strong to satisfy them that a murder has really been committed.

The person killed.

(c) *Any reasonable creature in being and under the king's peace*.—Therefore killing a child in its mother's womb is no murder (d), but it is otherwise if the child is born alive, and dies from wounds or drugs received in the womb. "Under the king's peace" excludes only alien enemies who are actually engaged in the exercise of war (e).

Malice aforethought.

(d) *With malice aforethought*.—The term "malice" is a difficult one. It is used in various and conflicting senses, and the mind is apt to slide from the one to the other.

That the malice aforethought charged in an indictment for murder is not necessarily what its name seems to imply—a personal hatred or ill-will towards the deceased—is manifest, when we consider that a large

(a) *R. v. Martin*, 5 C. & P. 130.

(b) *R. v. Holland*, 2 M. & R. 351; 1 Hale, 428.

(c) 2 Hale, 290.

(d) *But v. p.* 171.

(e) 1 Hale, P. C. 433. v. also 24 & 25 Vict. c. 100, s. 9, under which homicide committed by a British subject upon a foreigner abroad is punishable in our courts.

number of murders are committed with a view to robbery; or, again, that murder can be committed though the murderer has not the slightest wish to injure, or has not the slightest knowledge of the deceased; nay, more, we can conceive of the case of a person being convicted of the murder of his dearest friend or relative. What, then, is the meaning of the word malice as used in this connection? It has been described as meaning "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty and deliberately bent upon mischief" (a). It is, however, a difficult matter to give a description of malice which will apply to all cases of murder, of so various characters are they, and so built up on individual decisions.

It is necessary that we should again refer to the ordinary distinction between *express* and *implied* malice. Malice, express or implied.

Express malice may be said to be the *positive possession* of an intention:— Express malice.

i. Of causing death.

ii. Of causing such bodily injury as the offender knows is likely to cause death, *e.g.*, beating with an iron bar.

iii. Of causing bodily injury, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death (b).

Implied malice is that which the law assumes to exist in every case where a deliberately cruel or wanton act is committed by one person against another, and (as in cases already referred to) where the death is even un- Implied malice.

(a) *Fest.* 256, 262.

(b) *Express* malice is also described as "When one with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm" (1 Hale, P. C. 451).

intentionally caused while the accused is in the course of committing another felony (*a*).

The distinction between express and implied malice is of much importance in cases where provocation is alleged. No provocation, however great, will justify a homicide, or reduce it to the crime of manslaughter, if *express* malice be proved to exist (*b*).

Punishment.

As to the punishment of murder, nothing further need be said here than that the sentence is death (*c*), with regard to which, and its execution, particulars will be given in a later chapter. Accessories after the fact to murder are liable to penal servitude to the extent of life (*d*).

On an indictment for murder, the jury may convict the prisoner of manslaughter, or, of an attempt to murder; but not of an assault (*e*). And so a person charged as accessory after the fact to murder, may be convicted as accessory to manslaughter, if the principal felon be convicted of manslaughter only (*f*).

MANSLAUGHTER.

Manslaughter.

The unlawful killing of another without malice, either express or implied. The malice referred to here is that which was explained in the last section.

Moral character of the crime varies.

In this crime, again, we shall find acts varying to the utmost in their moral gravity. Perhaps on no other charge do persons more often appear in the dock and leave it without a stain on their characters. To take one class of examples—it constantly happens after an accident in a mine or on a railway that some of those engaged in

(*a*) The example usually given of implied malice, namely, that of a man wilfully poisoning another, seems, indeed, to be a case of express malice, as there most certainly is an evil intention present.

(*b*) *R. v. Mason*, Post. 132; v. 1 Hawk. c. 31, s. 24.

(*c*) 24 & 25 Vict. c. 100, s. 1.

(*d*) *Ibid.* s. 67.

(*e*) As to conspiracy to murder, v. p. 116.

(*f*) *R. v. Richards*, L. R. 2 Q. B. D. 311; 46 L. J. (M.C.) 200 36 L. T. N. S. 377; 25 W. R. (Di.) 88.

the management of the one or the other are required to meet a charge of manslaughter which is preferred against them.

Two kinds of manslaughter are distinguished :—

i. Upon a sudden heat (termed *voluntary*).

ii. In the commission of an unlawful act (termed *involuntary*) (a).

i. *Voluntary* (so-called).—The distinguishing mark of this kind of manslaughter is the provocation giving rise to sudden anger, during which the deed causing death is done. If upon a sudden quarrel two persons fight and one of them kills the other, the former will be guilty of manslaughter only, unless there are special circumstances which indicate evil design. But the act will be viewed in the less serious light of manslaughter only as long as the outburst of passion continues; not that the struggle need take place on the spot, for if the two at once adjourn to another place to fight, it will still be only manslaughter. So, also, in other cases of grave provocation, as if one man pulls another's nose, or is taken in adultery with another's wife. But here again, on the same grounds, to reduce the homicide to manslaughter, the blow which is the cause of death must be inflicted at once, while the provocation is still exercising its full influence. Otherwise the slaying will be regarded as a deliberate act of revenge (b). The plea of provocation will not avail if the provocation was sought for and induced by the slayer, nor, as has already been stated, if express malice on his part is shown to exist.

The instrument used when the person is acting under provocation is also a material consideration. It may be said that the provocation must be of the gravest nature

The instrument used is a material point.

(a) The objection to the terms "voluntary" and "involuntary," as opposed to each other, to denote varieties of the same crime, is obvious. There is no such thing as an involuntary crime. If the action be not a voluntary one, it is not criminal (v. p. 11). What seems to be meant is that in the one case death is anticipated, in the other it is not.

(b) *R. v. Hayward*, 6 C. & P. 157.

to render guilty of manslaughter only one who uses a deadly weapon or otherwise shows an intention to do the deceased grievous bodily harm. But a slighter provocation will suffice if the instrument used is one not likely to cause death, as a stick, or a blow with the fist. In fact, to reduce the offence to manslaughter, the mode of resentment must bear a reasonable proportion to the provocation (a).

Manslaughter
distinguished
from homicide
in self-defence

Manslaughter is to be distinguished from homicide in self-defence on sudden affray. In the latter, the excuse for the blow, &c., is the necessity to take such a step for self-preservation; in the former, this necessity does not exist, but its place is taken by a sudden heat of passion.

Involuntary
manslaughter

ii. *Involuntary* (so-called) when the death, not being intended, is caused in the commission of an unlawful act not amounting to a felony, or by the culpable neglect of a duty imposed upon the accused person. The unlawfulness of the act in which the accused is engaged is the ground of the homicide being regarded as manslaughter, and not homicide by misadventure merely. By "unlawful" here must be understood what is *malum in se*, and not what is merely *malum quia prohibitum*. Thus, if a man commit a mere civil wrong in consequence of which the death of another is caused, if there has been no criminal negligence on his part he is not guilty of manslaughter (b).

The unlawful
act.

Here, again, we may observe that it is immaterial whether the unlawfulness is in the act itself or (that which comes to the same thing) in the mode in which it is carried out. It must also be borne in mind that if the unlawful act is a felony, the homicide amounts to murder. An instance of manslaughter in the commission of an unlawful act is furnished when one person kills another while the two are playing at an unlawful

(a) *R. v. Steadman*, Fost. 292.

(b) *R. v. Franklin*, 15 Cox, 163; but v. *R. v. Fenton*, 1 Lew. C. C. 179.

game; of manslaughter in doing a lawful act in an unlawful manner—when a workman throws down stones into a street where persons may but are not likely to be passing.

One form of doing an act in an unlawful manner is *negligence*. This consideration very frequently presents itself in manslaughter. It may be said generally that whatever constitutes murder when done by fixed design, constitutes manslaughter when it arises from culpable negligence; for example, when a near-sighted man drives at a rapid rate, sitting at the bottom of his cart, and thereby causes the death of a foot-passenger (*a*). Again, when a person without taking proper precautions does an act which is dangerous, though not unlawful in itself, as, for instance, where a man shot at a target from a distance of 100 yards with a rifle which would carry a mile, in the course of which he killed another person, although at a spot distant 393 yards from the firing point; it was held that he was guilty of manslaughter (*b*). A large class of cases is that in which the death ensues from the treatment of disease. In such cases the person, whether a medical practitioner or not, who causes death is not indictable unless his conduct is marked by gross ignorance or gross inattention (*c*). Mere neglect on the part of a parent to provide medical aid for his child of tender years, in consequence of which his child dies, is not manslaughter, unless it is proved affirmatively that the death was caused or accelerated by such neglect; and medical evidence on behalf of the prosecution that the child's life probably might have been prolonged or saved by the parent calling in medical aid is not sufficient evidence to support a conviction (*d*). Where the prisoner had charge of a woman who was unable by illness and old age to attend to herself, but

Manslaughter
through
negligence.

(*a*) *R. v. Grout*, 6 C. & P. 629.

(*b*) *R. v. Salmon*, L. R. 6 Q. B. D. 79; 50 L. J. (M.C.) 25; 43 L. T. N. S. 573; Warb. L. C. 99.

(*c*) *R. v. Long*, 4 C. & P. 398.

(*d*) *R. v. Morby*, L. R. 8 Q. B. D. 571; 51 L. J. (M.C.) 85; 46 L. T. N. S. 288; 30 W. R. 613; 15 Cox, 35; Warb. L. C. 101.

who provided for the expenses necessary to maintain both, and her death was occasioned by the prisoner's neglect to provide her with the necessaries of life, it was held that the prisoner was rightly convicted of manslaughter (*a*). With regard to negligence, there is a great difference between criminal and civil proceedings. The criminal law does not recognise the defence of contributory negligence in manslaughter (*b*).

Accessories
before the fact.

It is commonly said that in manslaughter there can be no accessories before the fact, because the act causing death is done without premeditation. But though this may be true in cases the gist of which is the sudden heat, it is easy to imagine cases in which this principle could not be maintained (*c*).

Punishment.

Manslaughter is a felony, punishable by penal servitude to the extent of life—or in lieu of, or in addition to, the penal servitude or imprisonment, a fine may be imposed (*d*).

Having inquired into the nature of the crimes of murder and manslaughter, we are now in a position to examine certain classes of acts and determine by the circumstances whether they fall under the head of murder, manslaughter, or excusable homicide.

Fighting.

Killing by *fighting* :—

i. Murder—Deliberately fighting a duel—or after time for cooling—or under any other circumstances indicating deliberate ill-will.

ii. Manslaughter—In a sudden quarrel where the parties immediately fight—or where the parties are fighting in an unlawful amusement.

(*a*) *R. v. Instan*, L. R. [1893], 1 Q. B. 450 ; 62 L. J. (M.C.) 86 ; 68 L. T. N. S. 420 ; 41 W. R. 368 ; 57 J. P. 282.

(*b*) *R. v. Strindall*, 2 C. & K. 230 ; *R. v. Jones*, 11 Cox, 544. For other classes of acts which amount to manslaughter, the reader is referred to the classification of intents given below.

(*c*) *v. R. v. Gaylor*, cited above, p. 30.

(*d*) 24 & 25 Vict. c. 100 s. 5.

iii. Excusable—In a sparring match with gloves, or other lawful amusement, fairly conducted. But in the case of a sparring match there must be no intention to carry it on until one of the parties is incapacitated by exhaustion or injury, or the match will be unlawful (a).

Killing by *Correction* :—

Correction.

i. Murder—With weapon likely to cause death, *e.g.*, an iron bar.

ii. Manslaughter—With an instrument not likely to kill, though improper for use in correction—or where the quantity of punishment exceeds the bounds of moderation.

iii. Excusable—Correcting in moderation a child, servant, scholar, or criminal entrusted to one's charge.

Killing *without intending to kill whilst doing another act* :— In doing an unlawful act.

i. Murder—If that other act is a felony, and likely in itself to cause danger.

ii. Manslaughter—If that other act is 'unlawful, *i.e.*, *malum in se*.

iii. Excusable—If that other act is lawful, *i.e.*, not *malum in se*.

[But see next paragraph.]

Killing *whilst doing a lawful but dangerous act, e.g., driving* :— In doing a dangerous act.

i. Murder—If he perceives the probability of the mischief, and yet proceeds with his act.

ii. Manslaughter—If he might have seen the danger if, as he ought to have done, he had looked before him—or if, though he previously gave warning, this warning was not likely to prove entirely effectual, *e.g.*, driving in a crowded street.

(a) *R. v. Orton*, 14 Cox, 226 ; 39 L. T. 293 ; Warb. L. C. 53.

iii. Excusable—If he uses such a degree of caution as to make it improbable that any danger or injury will arise to others.

Homicide of
officers, &c.

Killing officers or others engaged in effecting the ends of justice :—

i. Murder—If the officer or other person is acting with due legal authority, and executing such authority in a legal manner, the defendant knowing that authority—or, in the case of a private person interfering, the intention of such person being intimated expressly.

ii. Manslaughter—If any one of these requisites is absent (*a*).

By officers, &c.

Killing by officers and others in the nominal execution of their duty :—

i. Murder—If the killing happens in the pursuit of a person not resisting, but fleeing, such person being charged with a misdemeanor only, or the arrest being only in a civil suit.

ii. Manslaughter—As above, if the death is caused by means not likely or intended to kill—or if, in an apprehension for felony, there is no need for the violence used by the officer.

iii. Justifiable—If the officer or other is resisted in the legal execution of his duty, and this in civil as well as in criminal cases—if a felon or giver of a dangerous wound cannot be otherwise apprehended, though he does not resist but only flees.

Recapitulation
of distinctions
between
murder, man-
slaughter, and
non-felonious
homicide.

The importance of a clear apprehension of the state of the law as to what acts are murder, manslaughter, and non-felonious homicide respectively, makes it not impertinent to insert the following compilation of distinctions judicially laid down on the subject, made by

(*a*) "The guilt of the accused may, under the law as it now stands, depend entirely upon nice and difficult questions belonging to the civil branch of the law, such as the technical regularity of civil process or the precise duty of a minister of justice in its execution."—Broom, C. L. 1044.

Sir James Stephen (Gen. View of Crim. Law, first edition, 1863):—

“The following states of mind have been specifically Murder. determined to be wicked or malicious in the degree necessary to constitute *murder*:—

“(a) An attempt to kill, whether directed against the person killed or not, or against any specific person or not.

“(b) An intent to commit felony.

“(c) An intent illegally to do great bodily harm.

“(d) Wanton indifference to life in the performance of an act likely to cause death, whether lawful or not.

“(e) A deliberate intent to fight with deadly weapons.

“(f) An intent to resist a lawful apprehension by any person legally authorised to apprehend.

“The following states of mind have been determined Manslaughter. to constitute that lighter degree of malice which is necessary to the crime of *manslaughter*:—

“(a) An intent to kill under the recent provocation, either of considerable personal violence inflicted on the prisoner by the deceased, or of the sight of the act of adultery committed by the deceased with the prisoner's wife.

“(b) An intent to inflict bodily injury not likely to cause death, under a slight provocation, as where a man striking a trespasser with a slight stick kills him.

“(c) A deliberate intent to fight in a manner not likely to cause death, or an intent to use a deadly weapon in a fight begun without the intention to use it.

“(d) An intent to resist an unlawful apprehension,

or an apprehension of the lawfulness of which the prisoner had no notice.

“(e) An intent to apprehend, or otherwise to execute legal process executed with unnecessary violence.

“(f) Negligence in doing a lawful act, or an unlawful act not amounting to felony.

Non-felonious
homicide.

“The following states of mind have been held not to be malicious or wicked at all, and where any of them exist at the time when death is caused no crime is committed:—

“(a) An intent to execute sentence of death.

“(b) An intent to defend person, habitation, or property against one who manifestly intends, or endeavours by violence or surprise to commit a known (*i.e.*, apparent) felony, such as rape, robbery, arson, burglary, &c.

“(c) An intent lawfully to apprehend or keep in custody a felon who cannot otherwise be apprehended or kept in custody, or to keep the peace if it cannot otherwise be kept.

“(d) Absence of all unlawful or malicious intents or states of mind. (This is the case of accident.)”

ATTEMPT TO MURDER.

Attempt to
murder.

The Offences against the Person Act, 1861, deals in several sections with attempts to murder effected in various ways. The punishment in every case is the same, namely, penal servitude to the extent of life. The various attempts specified are the following:—

Administering poison, wounding, or causing grievous bodily harm, with intent to murder (*a*).

Attempting to poison, drown, suffocate, or strangle, or shooting, or attempting to discharge loaded arms with

(a) 24 & 25 Vict. c. 100, s. 11.

like intent, whether any bodily injury be effected or not (*a*).

Destroying or damaging any building by gunpowder or other explosive substance, with like intent (*b*).

Setting fire to any vessel or its belongings, or casting away or destroying any vessel, with like intent (*c*).

Attempting to murder by any other means than those above specified (*d*).

(*a*) 24 & 25 Vict. c. 100, s. 14.
(*c*) *Ibid.* s. 13.

(*b*) *Ibid.* s. 12.
(*d*) *Ibid.* s. 15.

CHAPTER II.

RAPE, ETC.

RAPE.

Definition of rape.

THE offence of having carnal knowledge of a woman against her will by force, fear, or fraud.

Persons who cannot be convicted of the crime.

Certain persons cannot be convicted of this crime. An infant under the age of fourteen is deemed in law to be incapable of committing, or even, perhaps, of attempting, this offence, on account of his presumed physical incapacity (*a*). And this is a presumption which cannot be rebutted by evidence of capacity in the particular case. Neither can a husband be guilty of a rape upon his wife. But both a husband (*b*) and a boy under fourteen, and even a woman (*c*) may be convicted as principals in the second degree, and may be punished for being present aiding and abetting.

Essentials of the crime.

To constitute the offence, the act must be committed without the consent of the female and by force, fear, or fraud. If, however, she yielded through fear of death or duress, it is nevertheless rape; for here the consent is at most imperfect; or if she were insensibly drunk, or asleep; or if she submitted under a false representation, such as that she was about to undergo medical treatment, she being ignorant of the nature of the act (*d*). And a man, who induces a married woman to permit him to

(*a*) 1 Hale P. C. 631. See *R. v. Waite*, L. R. [1892], 2 Q. B. 600; 61 L. J. (M.C.) 187; 62 L. T. 300; 41 W. R. 80.

(*b*) *R. v. Lord Audley*, 3 Cobbett's St. Trials, 402; Warb. L. C. 228.

(*c*) *R. v. Ram*, 17 Cox, C. C. 609.

(*d*) *R. v. Flattery*, L. R. 2 Q. B. D. 410; 46 L. J. (M.C.) 130; 36 L. T. (N.S.) 32; 25 W. R. 398; Warb. L. C. 131.

have connection with her by personating her husband, is guilty of rape (*a*). It is equally rape though the female is a common prostitute or the concubine of the prisoner; but circumstances of this nature will probably operate with the jury in their consideration as to whether there was consent. It is necessary to prove penetration, but the slightest penetration will be sufficient (*b*), and if the prosecution fail to prove this, the prisoner may nevertheless be convicted of the attempt, or of an indecent assault.

At almost every trial for this crime the words of Sir Matthew Hale are recalled: "It is an accusation easy to be made and hard to be proved, but harder to be defended by the party accused, though innocent." It will be necessary to estimate the degree of credibility of the testimony of the woman who makes the charge. On this point we cannot do better than remember the words of Blackstone (*c*). The credibility of her testimony, and how far she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. The prisoner may call evidence to her generally bad character for want of chastity or indecency (*d*), and of her having had connection

Credibility of
the testimony
of the woman.

(*a*) 48 & 49 Vict. c. 69, s. 4.

(*b*) 24 & 25 Vict. c. 100, s. 63, and *R. v. Hughes*, 2 Mood. C. C. 190; 9 C. & P. 752.

(*c*) 4 Bl. 213.

(*d*) *R. v. Tissington*, 1 Cox, 48.

with him previously (*a*), but not of her having had connection with others. As to the last point she may be asked the question, but she would probably not be compelled to answer it; if she denies it, the person referred to cannot be called to contradict her (*b*).

Upon the trial of an indictment for rape the prisoner's wife is a competent witness either for the prosecution or defence, and she may be called as a witness for the prosecution without his consent; but she cannot be compelled to disclose any communication made to her by him during their marriage (*c*).

The punishment for this crime, which is a felony, is penal servitude to the extent of life (*d*).

CARNALLY ABUSING CHILDREN, LUNATICS, ETC., AND OTHER OFFENCES AGAINST WOMEN.

Carnally
abusing
children.

The former law on this subject has been materially altered by the Criminal Law Amendment Act, 1885, which provides that to unlawfully and carnally know any girl under the age of *thirteen* years is a felony, punishable to the extent of penal servitude for life (*e*); and any attempt to have unlawful carnal knowledge of any girl under the age of thirteen years is a misdemeanor, punishable by imprisonment for any term not exceeding two years, with or without hard labour (*f*). In either case, if the offender is under sixteen years of age, the court may order him to be whipped. Again, to unlawfully and carnally know, or attempt to have unlawful

(*a*) *R. v. Riley*, L. R. 18 Q. B. D. 481; 16 Cox, 191; Warb. L. C. 136.

(*b*) *R. v. Holmes*, L. R. 1 C. C. R. 334; 41 L. J. (M.C.) 12; 25 L. T. (N.S.) 669; 20 W. R. 123.

(*c*) 61 & 62 Vict. c. 36, ss. 1 (d) 4.

(*d*) 24 & 25 Vict. c. 100, s. 48.

(*e*) 48 & 49 Vict. c. 69, s. 4.

(*f*) *Ibid.* A boy under the age of fourteen cannot be convicted of the full offence, nor probably even of the attempt. But he may be convicted under sec. 9 of an indecent assault, although the indictment charges him with the felony. *R. v. Waite*, L. R. [1892], 2 Q. B. 600; 61 L. J. (M.C.) 187; 67 L. T. 300; 41 W. R. 80; *R. v. Williams*, L. R. [1893], 1 Q. B. 320; 62 L. J. (M.C.) 69; 41 W. R. 332.

carnal knowledge of any girl aged between *thirteen* and *sixteen* years, is also a misdemeanor, punishable like the last-mentioned offence; but the accused must be acquitted if he satisfies the jury that he had reasonable cause to believe that the girl was sixteen years old (*a*). Although the girl may consent or even incite to the commission of the offence, she cannot be convicted of aiding or abetting it (*b*). Having, or attempting to have, Idiots. unlawful carnal knowledge of any female idiot, or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, is a misdemeanor punishable in the same way (*c*). Again, for the owner or occupier, or any person assisting in the management of premises, to induce or suffer any girl to resort to such premises for the purpose of being carnally known by any man, is, if the girl is under the age of thirteen years, a felony, punishable by penal servitude to the extent of life; and if she is between thirteen and sixteen years of age, a misdemeanor, punishable by imprisonment for two years with or without hard labour, unless it be shown that the accused had reasonable cause to believe that the girl was sixteen years of age (*d*). Under this Act the jury may, on the trial of an indictment for rape, or for any offence made felony by section four thereof, convict the accused of the misdemeanors mentioned in sections three, four, or five of the Act, or of an indecent assault, if in their opinion the accused is guilty of such offence (*e*). The misdemeanors just referred to are:—

(a) Procuring the defilement by any person of a woman or girl by threats, or by false representations, or by administering drugs, &c. (*f*).

(a) 48 & 49 Vict. c. 69, s. 5.

(b) *R. v. Tyrell*, L. R. [1894], 1 Q. B. 710; 63 L. J. (M.C.) 58; 70 L. T. 41; 42 W. R. 255.

(c) 48 & 49 Vict. c. 69, s. 5.
(d) *Ibid.* s. 6. v. *R. v. Webster*, L. R. 16 Q. B. D. 134; 55 L. J. (M.C.) 63; 53 L. T. (N.S.) 824.

(e) 48 & 49 Vict. c. 69, s. 9.
(f) 48 & 49 Vict. c. 69, s. 3, provided, in the case of false representations, the woman is not of known immoral character.

(b) Attempting to have unlawful carnal knowledge of a girl under thirteen years of age (*a*).

(c) Defilement of a girl between thirteen and sixteen years of age, or of any female idiot or imbecile, under circumstances not amounting to rape (*b*).

It should be observed that a prosecution under the Act, for carnally knowing a girl between the ages of thirteen and sixteen years or of an idiot or imbecile woman, or for attempting to commit such an offence, must be commenced within three months after the commission of the offence (*c*); and no person can be convicted of those offences upon an indictment for rape or for any offence made felony by sec. 4 unless the prosecution was commenced within that time (*d*).

In addition to the above the following acts have by the same Act been made misdemeanors, punishable by imprisonment, with or without hard labour, for two years, viz. :—

Procuration.

(1.) To procure or attempt to procure any girl or woman, under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection with another person, either within or without the Queen's dominions (*e*).

(2.) To procure or attempt to procure any woman or girl, either within or without the Queen's dominions, to become a common prostitute (*f*).

(3.) To procure or attempt to procure any woman or girl to leave the United Kingdom, with intent that she may become the inmate of a brothel elsewhere (*g*).

(*a*) 48 & 49 Vict. c. 69, s. 4.

(*c*) *Ibid.* s. 5.

(*e*) 48 & 49 Vict. c. 69, s. 2 (1).

(*g*) *Ibid.* s. 2 (3).

(*b*) *Ibid.* s. 5.

(*d*) *R. v. Cotton*, 60 J. P. 824.

(*f*) *Ibid.* s. 2 (2).

- (4.) To procure or attempt to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become the inmate of a brothel within or without the Queen's dominions (a).

The Criminal Law Amendment Act, 1885, also provides that in cases of unlawful procuration, and defiling women by means of false pretences or the administration of drugs, or attempting to commit those offences, the accused person shall not be convicted on the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused (b). Upon a charge of defiling a girl under thirteen years of age, who apparently does not understand the nature of an oath, her statement may nevertheless be received if the court considers that she is of sufficient intelligence to justify that course, and that she understands the duty of speaking the truth ; but in that case her evidence must be corroborated by other material evidence implicating the accused (c).

It should be observed that in all prosecutions under this Act, and also in the case of indecent assault mentioned below, the wife or husband of the accused person may be called as a witness not only for the defence but also for the prosecution, and without the consent of the person charged (d). But such a witness could not be compelled to disclose any communication made to her or him by the accused during their marriage (e).

All misdemeanors under this Act, are made subject to the provisions of the Vexatious Indictments Act (f).

(a) 48 & 49 Vict. c. 69, s. 2 (4).

(b) *Ibid.* ss. 1, 2.

(c) *Ibid.* s. 4. *R. v. Wealand*, L. R. 20 Q. B. D. 827 ; *R. v. Paul*, L. R. 25 Q. B. D. 202 ; 59 L. J. (M.C.) 138 ; 62 L. T. 845 ; 38 W. R. 704.

(d) 61 & 62 Vict. c. 36, s. 4.

(e) *Ibid.* s. 1 (d).

(f) 48 & 49 Vict. c. 69, s. 17. v. p. 350.

Abusing
female
lunatics.

If any person employed in an institution for lunatics or any person having the charge of, or any attendant on, any single lunatic patient, carnally knows any female under treatment as a lunatic in such institution, or as a single patient, or attempts to commit that offence, he is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years. The consent of the lunatic will be no defence to such a charge (*a*).

Indecent
assault, &c.

To commit an indecent assault upon any female is a misdemeanor, punishable by imprisonment not exceeding two years (*b*).

It is no defence to a charge of indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency (*c*).

UNNATURAL CRIMES.

Sodomy and
bestiality.

To commit the crime against nature, with mankind or with any animal, is a felony, punishable by penal servitude to the extent of life, or by imprisonment with or without hard labour for not exceeding two years (*d*). The evidence is similar to that in rape, with two exceptions—(*a*) the consent of the person upon whom it was perpetrated is no defence. (*b*) Both parties, if consenting, are equally guilty; but if one of the parties is a boy under the age of fourteen years, it is felony in the other only.

Attempt, &c.

To attempt to commit the crime, or to make an assault with intent to commit the same, or to make any indecent assault upon a male person, is a misdemeanor, punishable by penal servitude to the extent of ten years (*e*).

Outrages on
decency.

And now by the Criminal Law Amendment Act, 1885, for a male person, either in public or private, to commit

(*a*) 53 Vict. c. 5, s. 324.

(*b*) 24 & 25 Vict. c. 100, s. 52.

(*c*) 43 & 44 Vict. c. 45, s. 2.

(*d*) 24 & 25 Vict. c. 100, s. 61; 54 & 55 Vict. c. 69, s. 1.

(*e*) 24 & 25 Vict. c. 100, s. 62. As to obtaining money by threatening to accuse of this crime, v. p. 96.

or be a party to the commission, or to procure or attempt to procure the commission, by any male person, of any act of gross indecency with another male person, is a misdemeanor, punishable by imprisonment for not more than two years, with or without hard labour (*a*).

ATTEMPTS TO PROCURE ABORTION.

Three classes of persons may be guilty of crimes under this heading. The woman herself—the person who procures or supplies the drug, &c.—any other person assisting. Attempt to procure abortion,

For a woman being with child, with intent to procure her own miscarriage, to administer to herself any poison or other noxious thing, or to use any instrument or other means; or by the woman,

For any person to do the same with intent to procure the miscarriage of any woman, whether she be with child or not, is a felony, punishable by penal servitude to the extent of life (*b*). It is not necessary that the drug administered should produce miscarriage or even have a tendency to do so; it is enough if it is “noxious,” and is given with the intent charged (*c*). by some other person.

For any person to procure or supply poison or other noxious thing, or any instrument or other thing, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of a woman, whether she be with child or not, is a misdemeanor, punishable by penal servitude to the extent of three years (*d*). Supplying the means.

CONCEALMENT OF BIRTH.

If a woman is delivered of a child, every person who by any secret disposition of the dead body of the child, Concealment of birth.

(*a*) 48 & 49 Vict. c. 69, s. 11.

(*b*) 24 & 25 Vict. c. 100, s. 58.

(*c*) *R. v. Cramp*, 14 Cox, 390; L. R. 5 Q. B. D. 307; 49 L. J. (M.C.) 44; 42 L. T. 442; Warb. L. C. 125.

(*d*) 24 & 25 Vict. c. 100, s. 59.

whether it died before, at, or after its birth, endeavours to conceal the birth thereof, is guilty of a misdemeanor, punishable by imprisonment not exceeding two years. A person tried for and acquitted of murder of a child may be convicted upon the same indictment of concealment of birth, if the facts justify that conclusion (a).

What must be proved.

The denial of the birth only is not sufficient. There must be some act of disposal of the body after the child is dead (b). In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found and identified as that of the child of which she is alleged to have been delivered (c). It will be noticed that the offence may be committed by others, and not only by the mother.

ABDUCTION.

Abduction.

We may distinguish four classes of cases:—

i. Of a woman on account of her *fortune*.

On account of the woman's fortune.

Where a woman of any age has any interest, present or future, in any real or personal estate, or is a presumptive heiress, or presumptive next of kin to any one having such interest—(a) whosoever, from motives of *lucre*, takes away or detains such woman against her will, with intent himself, or to cause some other person to marry her, or have carnal knowledge of her—or (b) whosoever fraudulently allures, takes away, or detains such woman, being under the age of *twenty-one*, out of the possession or against the will of her father or mother, or other person having the lawful care or charge of her, with like intent, is guilty of felony, punishable by penal servitude to the extent of fourteen years. The convicted person is also rendered incapable of taking any interest in her property; and if he is married to her, the property will be settled as the Chancery Division,

(a) 24 25 Vict. c. 100, s. 60.
(c) *R. v. Williams*, 11 Cox, 684.

(b) *R. v. Turner*. 8 C. & P. 755.

upon an information at the suit of the Attorney-General, appoints (a). The intent to marry or have carnal knowledge need only be proved, not the carrying out of that intent.

ii. By force, with intent to marry.

The same punishment attends the forcible taking away or detaining against her will a woman of any age with intent to marry or carnally know her, or cause her to be married or carnally known by any other person (b).

By force, with intent to marry.

iii. Of an unmarried girl under the age of eighteen years, with intent to have carnal knowledge.

Whoever, with intent that any unmarried girl under the age of eighteen years shall be unlawfully and carnally known by any man, takes such girl out of the possession and against the will of her father, or mother, or other person having the lawful care, or charge of her, is guilty of a misdemeanor, and liable to imprisonment for not more than two years, with or without hard labour (c).

Abduction of girl under eighteen with intent to have carnal knowledge.

It is also a misdemeanor, punishable in like manner, to detain any woman or girl against her will, either in a brothel or in any premises, with intent that she may be unlawfully and carnally known by any man (d).

Unlawful detention with intent to have carnal knowledge.

Withholding her wearing apparel or other property, or using threats of legal proceedings against her if she should take away with her any wearing apparel lent or supplied to her, constitute a detention under this Act (e).

iv. Of a girl under sixteen years of age.

To unlawfully take or cause to be taken any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, is a mis-

Of girl under sixteen.

(a) 24 & 25 Vict. c. 100, s. 53.

(c) 48 & 49 Vict. c. 69, s. 7.

(e) *Ibid.* s. 8.

(b) *Ibid.* s. 54.

(d) *Ibid.* s. 8.

demeanor, punishable by imprisonment not exceeding two years.(a)

Who are
within this
provision.

If the girl leaves her father, &c., without any inducement on the part of the defendant, and then goes to him, he is not within the statute (b). Nor is he, if he did not know, and had no reason to know, that she was under the lawful charge of her father or other person, and it is necessary for the prosecution to give some evidence from which such knowledge may properly be assumed (c). Of course mere absence for a temporary purpose and with the intention of returning does not interrupt the possession of the father, &c. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older, or even that he believed upon reasonable grounds that she was over that age (d). A taking by force is not necessary to constitute the offence. It is immaterial whether there be any corrupt motive, whether the girl consent, and whether the defendant be a male or female (e).

Evidence.

In all the above cases of abduction the husband or wife of the accused is a competent witness for the prosecution even without the consent of the person charged; but such a witness cannot be compelled to disclose any communications made to him or her by the accused during their marriage (f).

CHILD-STEALING, ABANDONING, ETC.

Child-stealing.

To unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain a child under the age of fourteen years, with intent to deprive the parent, or other person having lawful care or charge, of

(a) 24 & 25 Vict. c. 100, s. 55.

(b) *R. v. Oliver*, 10 Cox. 402.

(c) *R. v. Hibbert*, L. R. 1 C. C. R. 184; 38 L. J. (M.C.) 61; 19 L. T. (N.S.) 799; 17 W. R. 384.

(d) *R. v. Prince*, L. R. 2 C. C. R. 154; 44 L. J. (M.C.) 122; 32 L. T. (N.S.) 700; 24 W. R. 76; Warb. L. C. 109.

(e) *R. v. Handley*, 1 F. & F. 648.

(f) 61 & 62 Vict. c. 36, ss. 1 (d) 4.

the possession of the child, or with intent to steal any article upon or about the child, or, with any such intent, to receive or harbour any such child, knowing the same to have been so led away, &c., is a felony, punishable by penal servitude to the extent of seven years. But persons claiming any right to the possession of the child, or its mother or father if it is illegitimate, do not fall within the statute (a). It is not necessary that the force or fraud should have been practised upon the child, as the case is within the statute if force or fraud is employed against the parent or guardian (b).

To unlawfully abandon or expose any child under the age of two years in such manner that its life is endangered or its health is, or is likely to be, permanently injured, is a misdemeanor, punishable by penal servitude to the extent of three years (c).

(a) 24 & 25 Vict. c. 100, s. 56.

(b) *R. v. Bellis*, 62 L. J. (M.C.) 155; 69 L. T. 26; 57 J. P. 441, overruling *R. v. Barrett*, 15 Cox, 658.

(c) 24 & 25 Vict. c. 100, s. 27; v. *R. v. Falkingham*, L. R. 1 C. C. R. 222; 39 L. J. (M.C.) 47; Warb. L. C. 113. See also 57 & 58 Vict. c. 41, s. 1; *post*, p. 186.

Child-abandon-
ing, or
exposing.

CHAPTER III.

ASSAULTS, ETC.

UNDER this head we shall consider all the remaining offences against the person.

COMMON ASSAULT.

Assault.

An *assault* is an attempt or offer to do a corporal hurt to another, even without touching him, as if one lifts up his cane, or his fist, in a threatening manner, at another; or strikes at him, but misses him; this is an assault, *insultus*, which Finch describes to be "an unlawful setting upon one's person" (a). Other instances are striking at a man with or without a weapon, or presenting a gun at him at a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or holding up one's fist at him; or any other such like act done in an angry threatening manner. It will be noticed that there need not be an actual touching of the person assaulted. But mere words never amount to an assault (b).

Comprehensiveness of the crime.

The legal idea of an assault is so wide that it includes a variety of offences which do not at first sight seem to be assaults, at least in the popular signification of the term; for example, putting a child into a bag, hanging it on some palings, and there leaving it (c). And indeed it has been held that detaining a child at a board school, after the regular school hours, and preventing such child from leaving the school, for not learning "home

(a) 3 Bl. 120.

(b) 1 Hawk. c. 62 s. 1.

(c) *R. v. March*, 1 C. & K. 496.

lessons," which the master had directed the child to learn, but which the master had no power under the Elementary Education Acts to do, amounts to a criminal assault (a).

A *battery* is not necessarily a forcible striking with the hand or stick or the like, but includes every touching or laying hold (however trifling) of another person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner; for example, jostling another out of the way (b). Thus, if a man strikes at another with a cane or fist, or throws a bottle at him, if he miss, it is an *assault*; if he hit, it is a *battery*. Every battery includes an assault.

As a rule, consent on the part of the complainant deprives the act of the character of an assault, unless, indeed, non-resistance has been brought about by fraud (c). But the fact of consent will in general be immaterial where the alleged assault is of such a nature that its infliction is injurious to the public as well as to the person injured, and involves an actual breach of the peace. Thus, the principals at a prize fight, and all persons aiding and abetting them, are guilty of an assault (d).

A common assault is also the subject of a civil action for damages; and the party injured may either prosecute or bring his action first. The court will not, however, pass judgment during the pendency of a civil action for the same assault (e), the reason obviously being that otherwise the issue of the civil action might be prejudiced.

A common assault, that is, a mere assault which may or may not have proceeded to a battery, is a misdemeanor,

Battery.

Effect of consent.

Assault the subject also of civil proceedings.

Punishment, or compensation.

(a) *Hunter v. Johnson*, 53 L. J. (M.C.) 182.

(b) 1 Hawk. c. 62, s. 2. v. *Coward v. Baddeley*, 4 H. & N. 478.

(c) Except in the case of an indecent assault on a child under thirteen years of age. v. 43 & 44 Vict. c. 45, s. 2; also the judgments of Wills and Stephen, J.J., in *R. v. Clarence*, L. R. 22 Q. B. D. 23; 58 L. J. (M.C.) 10; 59 L. T. 780; 37 W. R. 166; Warb. L. C. 137.

(d) *R. v. Coney*, L. R. 8 Q. B. D. 534; 51 L. J. (M.C.) 66; 46 L. T. 307; 30 W. R. 678; Warb. L. C. 55.

(e) *R. v. Mahon*, 4 A. & E. 575.

punishable by imprisonment not exceeding one year (a). But the justice of the case is often more adequately met by compensation to the person injured. Therefore, with the assent of the prosecution, if the circumstances appear to warrant that course, the court may allow the defendant to plead guilty, and inflict upon him a merely nominal fine, on the understanding that he shall make a compensation to the prosecutor (b).

Summary
proceedings.

Common assaults are usually disposed of by the magistrates at petty sessions. The limit of punishment in ordinary cases of such summary conviction is a fine of £5 or imprisonment not exceeding two months; but in more aggravated cases of assault upon boys whose age does not exceed fourteen years, or upon any female, the limits are £20 and six months (c). But a Court of Summary Jurisdiction has no power to convict of a common assault, unless the complaint to the court is made by the party aggrieved, or some one on his behalf, but this does not apply to the aggravated assaults above mentioned (d).

Separation
Order.

A recent statute (e) has much extended the power which the court possessed under the Matrimonial Causes Act, 1878, of making an order having the effect of a decree for a judicial separation in a case of aggravated misconduct by a husband toward his wife.

It is now provided that a married woman whose husband has been convicted *summarily* of an aggravated assault upon her, or has been convicted *upon indictment* of any assault upon her, and sentenced to a fine of more than £5 or to imprisonment for a term exceeding two months, or whose husband shall have deserted her or been guilty of persistent cruelty to her, or of wilful

(a) 24 & 25 Vict. c. 100, s. 47.

(b) *R. v. Roxburgh*, 12 Cox, 8.

(c) 24 & 25 Vict. c. 100, ss. 42, 43.

(d) *Nicholson v. Booth*, 57 L. J. (M.C.) 43; but the defendant may be committed for trial and convicted *on indictment* although the party aggrieved has not made complaint, *R. v. Gaunt*, 73 L. T. 585; 18 Cox C. C. 210; 60 J. P. 90.

(e) 58 & 59 Vict. c. 39.

neglect to provide reasonable maintenance for her or her infant children, and shall thus have caused her to live apart from him, may apply to a Court of Summary Jurisdiction, or to the court before whom her husband has been convicted on indictment, for an order under the Act (*a*). The court may thereupon make an order having the effect of a judicial separation, and may also give to the wife the legal custody of the children of the marriage while under the age of sixteen, and order the husband to pay her for maintenance a sum not exceeding £2 per week (*b*). An order cannot be made under this Act if it is proved that the wife has committed adultery, unless the husband has condoned or connived at or by his wilful neglect or misconduct conduced to such adultery; and if the wife, after the making of the order, either commits adultery or voluntarily resumes cohabitation with her husband the order is to be discharged (*c*). If the court thinks that the matter would be more conveniently dealt with by the High Court it may refuse to make an order (*d*). A right of appeal is given to the Probate, Divorce and Admiralty Division of the High Court (*e*).

The magistrates have no power to hear and determine any case of assault in which any question shall arise as to the title to lands, tenements, or hereditaments, or any interests therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. And if the assault is accompanied by an attempt to commit a felony, or, in the opinion of the magistrates, is a fit subject for prosecution by indictment, they must abstain from any final adjudication, and leave the case to be prosecuted by indictment (*f*).

When jurisdiction of magistrates is ousted.

As to the evidence on behalf of the accused, it may be stated generally that the same facts which would excuse a homicide on the ground of misadventure are a

Defence.

(*a*) 58 & 59 Vict. c. 39, s. 4.

(*c*) *Ibid.* ss. 6, 7.

(*e*) *Ibid.* s. 11.

(*b*) *Ibid.* s. 5.

(*d*) *Ibid.* s. 10.

(*f*) 24 & 25 Vict. c. 100, s. 46.

good defence upon an indictment for a battery (a). Other defences are, that it was committed merely in self-defence, or in the proper administration of moderate correction, or in the execution of public justice, or in some lawful game. In order that the defendant should not be punished twice for the same offence, it is provided that if the justices dismiss a summons for a common assault, in a case where the complaint is made by or on behalf of the person aggrieved, either because they consider the offence not to be proved, or that the assault was justified, or so trifling as not to merit any punishment, they shall give the accused a certificate evidencing such dismissal. If such a certificate is obtained, or if the accused has been convicted, and shall have paid the fine or suffered the imprisonment inflicted, he shall be released from all proceedings, *civil or criminal*, for the same cause (b).

So much for *common* assaults ; we have now to deal with those of a more serious character.

ACTUAL AND GRIEVOUS BODILY HARM.

Actual bodily harm.

If the assault occasions *actual bodily harm*, the punishment is penal servitude to the extent of three years (c) for the misdemeanor. Actual bodily harm would include any hurt or injury calculated to interfere with the health or comfort of the prosecutor ; it need not be an injury of a permanent character (d). Communicating a venereal disease to one's wife is not assaulting her, nor does it amount to inflicting upon her actual bodily harm within the meaning of the Act (e).

Wounding and grievous bodily harm.

Unlawfully and maliciously *wounding* or inflicting any *grievous bodily harm* upon any other person, with or without any weapon or instrument is a misdemeanor, punishable by penal servitude to the extent of three

(a) Arch. 759.

(b) 24 & 25 Vict. c. 100, ss. 44, 45.

(c) *Ibid.* s. 47.

(d) Arch. 759.

(e) *R. v. Clarence*, 58 L. J. (M.C.) 10 ; L. R. 22 Q. B. D. 23 ; Warb. L. C. 137.

years (a). If any person (a) wound, (b) cause grievous bodily harm to, (c) shoot at, or (d) attempt to shoot at any other person, *with intent* to (a) maim, (b) disfigure, or (c) disable any person, or (d) to do some other grievous bodily harm to him, or (e) to resist or prevent the lawful apprehension of any one, he is guilty of a felony, punishable by penal servitude to the extent of life (b).

To constitute a *wounding*, the continuity of the skin Wound. must be broken. The nature of the instrument is immaterial, whether it be a stab by a knife, a kick, or a gunshot wound, &c. (c).

To *maim* is to injure any part of a man's body, which Maim. may render him less capable of fighting. The injury is termed *mayhem*.

The term "*disfigure*" explains itself. To *disable*, Disfigure, refers to the causing of a permanent, and not merely a disable. temporary disablement (d).

The *grievous bodily harm* need not be either permanent or dangerous, so long as it seriously interferes with health or comfort (e).

The intent can of course only be proved by presump- The intent. tive evidence gathered from the facts of the case. The intent need not be to maim, &c., the particular person who is injured, or indeed any particular person; thus, if a person wounds A. while intending to inflict grievous bodily harm on B., or even while doing an unlawful act as a mere piece of foolish mischief provided that act is one likely to injure others, he is guilty of wounding with intent, &c. (f).

(a) 24 & 25 Vict. c. 100, s. 20.

(b) *Ibid.* s. 18.

(c) *R. v. Wood*, 1 Mood. C. C. 278; *R. v. Briggs*, *Ibid.* 318.

(d) *R. v. Boyce*, 1 Mood. C. C. 29.

(e) *R. v. Ashman*, 1 F. & F. 88.

(f) *R. v. Martin*, L. R. 8 Q. B. D. 54; 51 L. J. (M.C.) 36; 45 L. T. (N.S.) 444; *R. v. Latimer*, L. R. 17 Q. B. D. 359; 55 L. J. (M.C.) 135; 54 L. T. (N.S.) 789; Warb. L. C. 107.

ASSAULT WITH INTENT TO COMMIT A FELONY.

Assault with
felonious
intent.

This crime is a misdemeanor, punishable with imprisonment not exceeding two years. If the intent cannot be proved, the defendant may be convicted of a common assault (*a*).

ATTEMPT TO CHOKE, ETC., WITH INTENT, ETC.

Attempt to
choke, &c.,
with intent,
&c.

Whosoever attempts to *choke, suffocate, or strangle* any other person, or by any means calculated to choke, &c. renders any other person insensible, unconscious, or incapable of resistance, with *intent* to enable himself or any other person to commit, or assist in committing, any indictable offence, is guilty of felony, and punishable with penal servitude to the extent of life, with or without whipping in addition (*b*).

To drug, &c.,
with intent,
&c.

With like intent, to apply, or administer, or cause to be taken, or to attempt to administer, &c., or to attempt to cause to be administered, &c., any chloroform, laudanum, or other *stupefying or overpowering drug*, matter, or thing, is a felony, punishable in the same way, with the exception of the whipping (*c*).

ADMINISTERING POISON, ETC.

Administering
poison, &c.

To maliciously administer, &c., any poison, or other destructive or noxious thing, so as thereby to endanger life or to inflict grievous bodily harm, is a felony punishable by penal servitude to the extent of ten years (*d*). If the administering, though it does not so endanger life or inflict harm, is with intent to injure, aggrieve, or annoy the person, the offence is a misdemeanor, punishable by penal servitude to the extent of three years (*e*). A person indicted for the first of these offences may be found guilty of the second (*f*).

(*a*) 24 & 25 Vict. c. 100, s. 38.

(*b*) *Ibid.* s. 21; 26 & 27 Vict. c. 44.

(*c*) 24 & 25 Vict. c. 100, s. 22.

(*e*) *Ibid.* s. 24.

(*d*) *Ibid.* s. 23.

(*f*) *Ibid.* s. 25.

INJURING BY EXPLOSIVE OR CORROSIVE SUBSTANCES.

By explosion of gunpowder or other explosive substance, to maliciously burn, maim, disfigure, disable, or do any grievous bodily harm to any person, is a felony, punishable by penal servitude to the extent of life (a). The same punishment is awarded for causing any gunpowder, or other explosive substance, to explode, or sending or delivering to, or causing to be taken or received by, any person, any explosive or other dangerous or noxious thing, or putting or laying at any place, or throwing at or upon, or otherwise applying to any person any corrosive fluid or any destructive or explosive substance, with *intent* to burn, maim, disfigure, or disable, or do any grievous bodily harm to any person, and this whether any bodily injury be effected or not (b). If the gunpowder or other explosive substance is placed, or thrown in, upon, or near any building, ship, or vessel, with intent to do any bodily injury to any person, whether such purpose be effected or not, the offender is guilty of a felony, punishable by penal servitude to the extent of fourteen years (c).

Injuring by explosive, corrosive, or other destructive substances.

ENDANGERING SAFETY OF RAILWAY PASSENGERS.

The following acts are felonious, punishable by penal servitude to the extent of life:—

Acts endangering safety of railway passengers, felonies;

(i) To put or throw upon or across any railway any wood, stone, or other thing; (ii) to take up, remove, or displace any rail, sleeper, or other thing belonging to a railway; (iii) to move or divert any points or other machinery belonging to any railway; (iv) to make, or show, hide or remove any signal or light upon or near to any railway; (v) to do or cause any other thing to be done with intent to endanger the safety of passengers (d); or (vi) to throw against or into any railway engine, carriage, or truck, any wood, stone, or other thing, with

(a) 24 & 25 Vict. c. 100, s. 28.
(c) *Ibid.* s. 30.

(b) *Ibid.* s. 29.
(d) *Ibid.* s. 32.

intent to injure or endanger the safety of any person in the train (*a*). If committed by a young person, these offences may be dealt with summarily and punished by fine or imprisonment for three months; and in the case of a male under fourteen years of age with a whipping (*b*).

Misdemeanor. It is a misdemeanor, punishable with imprisonment not exceeding two years, by any unlawful act, or by any wilful omission or neglect, to endanger the safety of any person conveyed or being in or upon a railway, or to aid or assist therein (*c*).

It may be observed here that an acquittal upon an indictment for a felony under the above enactments is no bar to a subsequent indictment for a misdemeanor under sec. 34, although on the same facts (*d*).

As to injuries from Furious Driving, v. p. 133.

ASSAULTS, ETC., CONNECTED WITH WRECKS.

Assaulting
those pre-
serving, &c.,
wrecks.

To assault, and strike or wound any magistrate, officer, or other person lawfully authorised in or on account of his exercising his duty in the preservation of any vessel in distress, or any wrecked vessel or goods, is a misdemeanor, punishable by penal servitude to the extent of seven years (*e*).

Impeding
escape.

To impede any person endeavouring to escape from a wreck or vessel in distress, or endeavouring to save another, is a felony, punishable by penal servitude to the extent of life (*f*).

FORCING SEAMEN ON SHORE.

Forcing
seamen on
shore.

For a master or other person belonging to a British ship wrongfully to force on shore and leave behind, or otherwise wilfully and wrongfully to leave on shore or at sea, any seaman or apprentice, before the completion of

(*a*) 24 & 25 Vict. c. 100, s. 33.

(*b*) 42 & 43 Vict. c. 49, s. 11. v. Book IV.

(*c*) 24 & 25 Vict. c. 100, s. 34.

(*e*) 24 & 25 Vict. c. 100, s. 37.

(*d*) *R. v. Gilmore*, 15 Cox, 85.

(*f*) *Ibid.* s. 17.

the voyage for which he is engaged, or the return of the ship to the United Kingdom, is a misdemeanor (*a*). So also is it to discharge or leave behind any seaman or apprentice in any place abroad, without obtaining the proper sanction specified in the Act (*b*). Each of these misdemeanors is punishable by fine or by imprisonment not exceeding two years, or may be dealt with on summary conviction, and in that case, is punishable by imprisonment not exceeding six months, or a penalty not exceeding £100 (*c*). Unlawfully leaving seamen behind.

ASSAULTS ON OFFICERS.

To assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or to assault any person with intent to resist or prevent the lawful apprehension of oneself or of any other person for any offence, is a misdemeanor, punishable by imprisonment not exceeding two years (*d*). Assaults on peace officers.

ASSAULTS ON OTHERS IN THE EXECUTION OF THEIR DUTY.

Clergymen.—(*a*) By threats or force to obstruct or prevent a clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or (*b*) to strike, or offer violence, to one so engaged, or (*c*) to arrest upon civil process one so engaged, or who, to the knowledge of the accused, is going to or coming from such performance, is a misdemeanor, punishable by imprisonment not exceeding two years (*e*). Assaults, &c., on clergymen.

Gamekeepers, v. p. 139.

(*a*) 57 & 58 Vict. c. 60, s. 187.

(*b*) *Ibid.* s. 188.

(*c*) *Ibid.* s. 680.

(*d*) 24 & 25 Vict. c. 100, s. 38; v. also 34 & 35 Vict. c. 112, s. 12; and 48 & 49 Vict. c. 75. For assaulting, &c., officers of the customs, v. p. 106.

(*e*) 24 & 25 Vict. c. 100, s. 36.

ASSAULTS ON THOSE IN A DEFENCELESS POSITION.

Assaults on,
and neglect of,
apprentices or
servants.

Apprentices or Servants.—Whosoever, being legally liable either as master or mistress to provide for any apprentice or servant necessary food, clothing, or lodgings, wilfully and without lawful excuse refuses or neglects to do so, or (b) unlawfully and maliciously does or causes to be done any bodily harm, so that the life of the apprentice or servant is endangered or his health likely to be permanently injured, is guilty of a misdemeanor, and is punishable by penal servitude to the extent of three years (a).

Children.—Abandoning or exposing, v. p. 175.

Children,
cruelty by
custodian.

For a person over sixteen years of age who has the custody or charge of a child under sixteen years of age, to wilfully ill-treat, neglect, abandon, or expose such child in a manner likely to cause it unnecessary suffering or injury to its health, is, under the Prevention of Cruelty to Children Act, 1894, a misdemeanor, punishable, upon conviction on indictment, by imprisonment for two years, or a fine of £100, or both; and the fine may be increased to £200 or a sentence of five years penal servitude be inflicted if it be shown that the accused was interested in any money payable on the child's death, and knew that it was so payable. A court of summary jurisdiction may deal with the matter by a sentence of six months imprisonment, or a fine of £25, or both (b). It is also provided by the same Act that where a person having the custody of a child under the age of sixteen is convicted of cruelty towards it or committed for trial for such an offence, or is bound over to keep the peace towards the child, the court may take the child out of the custody of such person and commit it to the custody of a relation or other fit person and compel the parent to contribute to its maintenance (c). Magistrates are

(a) 24 & 25 Vict. c. 100, s. 26.
(c) *Ibid.* ss. 6, 7.

(b) 57 & 58 Vict. c. 41, s. 1.

also empowered upon a proper information being laid to issue a warrant authorising a superior officer of police to search for any child who is alleged to be ill-treated or neglected, and if it is found to have been so ill-treated to bring it before the court in order that due provision for its safety may be made (a). The Act does not take away the right of a parent or teacher, or other lawful custodian of a child to administer punishment to it (b).

It is an offence, punishable by a court of summary jurisdiction, with imprisonment for three months, or a fine of £25, or both, (a) to cause or allow a boy under fourteen or a girl under sixteen years of age to be in any street or place for the purpose of begging, whether under the pretence of singing, selling, &c., or otherwise; (b) to cause or allow children under those respective ages to be in a street or public-house for singing, playing, or performing for profit, or offering anything for sale, between 9 P.M. and 6 A.M., which hours may be extended or restricted by the local authority (c). It is an offence, punishable in the same way, to cause or allow any child under *eleven* years of age to be *at any time* in a street, or public-house, or in a circus or place of amusement, or public entertainment, for the purpose of singing, playing, or performing for profit, or offering anything for sale, or to cause or allow a child under sixteen years of age to be trained as an acrobat, or circus performer, or for any dangerous exhibition; but a licence may be granted by magistrates, subject to proper restrictions for the protection of the child, for the employment of a child above *seven* years of age, to take part in such entertainment or to be so trained (d).

In proceedings under the above-mentioned Act, the Evidence. defendant's husband or wife may be called as a witness for the prosecution or defence and without the consent of the person charged, but cannot be compelled to disclose

(a) 57 & 58 Vict. c. 41, s. 10.
(c) *Ibid.* s. 2.

(b) *Ibid.* s. 24.
(d) *Ibid.* ss. 2, 3.

any communication made to him or her by the accused during their marriage (a).

It is of course necessary to prove the age of the child in question, and this is usually done by producing a certificate of birth with evidence of identity. But this may be proved by any legal evidence, such as the production of the child in court or the statement of a witness, who has seen it, of his belief as to its age (b).

Dangerous performances.

By another statute it is forbidden to cause any male child or young person under *sixteen* years of age or any female under *eighteen* years of age to take part in any public exhibition or performance whereby its life or limbs might be endangered. The penalty for the offence is £10; but if an accident happens to the child, causing it actual bodily harm, the employer is liable to be indicted for an assault, and the court has power to order him to pay £20 compensation for the benefit of the child (c).

Neglecting or ill-using lunatics.

Lunatics.—Ill-treating, or wilfully neglecting a patient in an institution for lunatics, by any person employed therein, or by any one having charge of a lunatic, is a misdemeanor, punishable on indictment by fine or imprisonment, or on summary conviction by a fine not exceeding £20 (d). The expression “institution for lunatics” includes any house licensed for their reception, and it is a misdemeanor, punishable by a fine of £50, and by imprisonment, to take charge of, receive, or detain a lunatic for payment in any house not so licensed, or to receive or detain two or more lunatics in an unlicensed house, even if no payment is required (e).

The Lunacy Act, 1890, contains many other pro-

(a) 61 & 62 Vict. c. 36, ss. 1 (d), 4.

(b) *R. v. Cox*, L. R. [1898], 1 Q. B. 179; 67 L. J. (Q. B.) 293; 77 L. T. 534.

(c) 42 & 43 Vict. c. 34, s. 3, as amended by 60 & 61 Vict. c. 52.

(d) 53 Vict. c. 5, s. 322 (The Lunacy Act, 1890). (e) *Ibid.* s. 315.

visions for the protection of lunatics, and inflicts severe penalties if these provisions are not complied with (a).

FALSE IMPRISONMENT.

Wrongful imprisonment is a misdemeanor at common law, punishable by fine or imprisonment, or both. All that the prosecutor has to prove is the imprisonment; it is for the defendant to justify what he did (b). The indictment also usually alleges an assault. False imprisonment.

Every confinement or restraint of the liberty of a person is an imprisonment; for example, by forcibly detaining a man in the street. Though a party, on being shown a magistrate's warrant, goes willingly at the desire of the constable, this is an imprisonment which the person giving him into custody may be called upon to justify (c). What amounts to an imprisonment.

We shall see under the title "Arrest," in what cases one person is justified in detaining another (d).

(a) See, in particular, s. 316, Neglect to send notices on admission to institution, or on discharge or death; s. 317, Wilful misstatements in petitions, medical certificates, reports, &c.; s. 318, False entries in books or returns; s. 319, Omission to give notice of lunatic's death to Coroner; s. 321, Obstructing Lunacy Commissioners or visitors; s. 40, Using mechanical means of bodily restraint on lunatics without necessity or contrary to regulations of Act; s. 214, Making untrue statements for the purpose of obtaining a licence for a house for the reception of lunatics; s. 222, Detaining lunatics more than two months after the licence for the house has expired; s. 233, Lodging lunatics in premises not included in the licence. Offences against any of these sections are declared to be misdemeanors.

(b) Arch. 797.

(c) *Uinn v. Morris*, 2 C. & P. 361; but v. also *Arrowsmith v. Le Mesurier*, 2 B. & P. N. R. 211.

(d) As to indecent assault, v. p. 170; Assaults in Trade Disputes, v. p. 112; Spring Guns, &c., v. p. 141.

PART III.
OFFENCES AGAINST INDIVIDUALS—THEIR
PROPERTY.

CHAPTER I.

LARCENY.

Definition of
larceny.

LARCENY or theft may be defined as the wilfully wrongful or fraudulent taking *possession* of the goods of another with a felonious intent to deprive the owner of his *property* in them (*a*).

Larceny,
simple or
compound.

Larceny is either Simple or Compound. Compound, or, as it is termed, “mixed” or “complicated” larceny, differs from simple larceny merely in that the former is accompanied with certain circumstances of aggravation. We shall defer the consideration of these aggravated cases until the simple crime has been dealt with.

The existing statute law on the subject of larceny and kindred offences is contained in the Larceny Act, one of the Criminal Law Consolidation Acts, 1861(*b*).

To understand the definition we have given, and to be prepared to distinguish the offences of larceny, em-

(*a*) Another definition, given by a high authority, is this: “An act of dealing, from any motive whatever, unlawfully and without claim of right, with anything capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person, other than the general or special owner thereof.”—St. Di. 254.

(*b*) 24 & 25 Vict. c. 96. In the present chapter the quotation merely of a section must be understood to refer to that Act.

bezzlement, and obtaining by false pretences, the line between which is very finely drawn, it will be necessary to inquire what is signified by "possession," what by "property."

Possession extends not only to those things of which we have manual prehension, but those which are in our house, on our land, or in the possession of those under our control, as our servants, children, &c. (a). *Property*, in the sense of the definition, is "the right to the possession, coupled with an ability to exercise that right" (b).

To explain the nature of the crime it will be convenient to consider separately the component parts of the definition under the following heads:—

- i. What kinds of property may be the subjects of larceny.
- ii. What constitutes a wilfully wrongful or fraudulent taking possession of another's goods.
- iii. What must be the intent.

i. The subjects of larceny.

Though it may be said that there is not any tenable ground for making some kinds of property incapable of being the subjects of larceny, for a long time there were many of such exceptions. Some still continue, while in other cases the wrongful taking is dealt with in an exceptional way. The goods must, in the absence of any express statutory enactment, be personal goods. This is the only kind of property which can be the subject of larceny at common law. As to other kinds:—

(a) The first and chief example of the common law exclusion is—Things *real*, as lands and houses; and things attached or *belonging to the realty*, as trees,

What may be the subject of larceny.

First exclusion —things real, &c.

(a) Rosc. 609; v. *R. v. Reed*, 23 L. J. (M.C.) 25.

(b) Rosc. 609.

growing crops, grass, the stones or lead of a house; also *title deeds* and other writings relating to real estate, inasmuch as they savour of the realty, and pass like real property to the heir or devisee. If the rights of the owner of such property are violated, he must seek a remedy in a civil action of trespass. He cannot, as a rule (see exceptions below), appeal to the criminal law for the punishment of the offender. But if the things have been severed from the land, &c., *e.g.*, mown grass, and are then feloniously taken away, these may be made the subjects of an indictment for larceny, inasmuch as by the severance they have become personal goods. However, to give them this quality where the severance has been by the wrongdoer himself a substantial interval must have elapsed between the severance and the removal, so that the acts are perfectly distinct. And in this interval the wrongdoer must have intended to have abandoned the wrongful possession begun at the time of the severance; for example, it will not be larceny to sever and then conceal till one can conveniently return and carry away, however long the interval may be, for the whole is regarded as one continuous act (*a*).

The following are the statutory modifications of the rule excluding this class of property :—

Materials,
fixtures, &c.

a. Materials of buildings, fixtures, &c.—To steal or to rip, cut, sever, or break, with intent to steal, any glass or wood-work belonging to any building whatsoever; or any lead, iron, copper, brass, or other metal; or any utensil or fixture respectively fixed in or to any building whatsoever; or anything made of metal fixed in any land, or for a fence to a dwelling-house or garden being private property, or in any square or street, or in any place dedicated to the public use or ornament,

(*a*) *R. v. Townley*, L. R. 1 C. C. R. 315; 40 L. J. (M.C.) 144; 24 L. T. (N.S.) 517; 17 W. R. 725; Warb. L. C. 140. *R. v. Read*, L. R. 3 Q. B. D. 131; 47 L. J. (M.C.) 50.

or in any burial-ground, is punishable as simple larceny (*a*).

β. Mines, &c.—To steal, or sever with intent to steal, Ore, coal. the ore of any metal, or any manganese, black lead, &c., or any coal from any mine, bed, or vein, is a felony, punishable by imprisonment not exceeding two years (*b*).

The same consequences attend thefts of a similar nature by any one employed about the mine (*c*).

γ. Trees.—To steal, cut, destroy, or damage with Trees. intent to steal, the whole or any part of any tree, sapling, shrub, or underwood growing in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, if the injury amounts to the value of £1, or, if growing elsewhere, to the value of £5, is a felony punishable as simple larceny (*d*). If the injury is to the value of 1s., wherever the tree, &c., may be growing, the accused may be dealt with summarily, and punished for the first offence, by fine not exceeding £5 over and above the injury done; for the second, imprisonment not exceeding twelve months; on a third conviction, the offence is a felony, punishable as simple larceny (*e*).

δ. Plants, &c.—To steal, or destroy, or damage with Plants, fruit, &c. intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hothouse, or conservatory, is punishable on summary conviction by imprisonment not exceeding six months, or fine not exceeding £20. The second offence is punishable as simple larceny (*f*).

ε. Deeds, &c.—To steal, or for any fraudulent purpose Deeds, &c. to destroy, cancel, obliterate, or conceal any or part of

(*a*) s. 31. The punishment for simple larceny extends to three years' penal servitude, v. p. 212.

(*b*) s. 38.

(*c*) s. 39.

(*d*) s. 32.

(*e*) s. 33.

(*f*) s. 36. It should be noticed that by s. 37 stealing cultivated roots or plants used for the food of man or beast growing in *any* land is punishable on summary conviction by fine and imprisonment, v. pp. 276, 482.

any documents (a) of title to lands, is a felony punishable by penal servitude to the extent of three years (b).

Second exclusion—*Choses in action*.

(b) A second exclusion by the common law is of *choses in action* (i.e., mere rights to demand property by action or other proceedings), or evidence of such rights.

This exclusion virtually a thing of the past.

But without delaying at the common law view of the matter, it may be stated that the statutory exceptions to it include practically every *chose in action* that has ever been known to be stolen, or which occurred to the mind of the draughtsman as capable of being stolen. Thus, to steal, or for any fraudulent purpose to destroy, cancel, or obliterate the whole or any part of any *valuable security*, other than a document of title to lands, is a felony, of the same nature and degree, and punishable in the same manner, as if the offender had stolen any chattel of like value with the sum represented by the security (c). The term “valuable security” is declared to include any order, exchequer acquittance, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank; and also any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state; and any document of title to lands (v. *supra*), goods, e.g., dock warrants, delivery orders, and bills of lading (d); also any Post Office money order (e). Of course under these terms will be included all ordinary cheques, promissory notes, &c.

(a) As to Wills, v. p. 195.

(b) s. 28. As to concealment of instruments of title, or falsification of pedigree by vendor or mortgagor, or his solicitor or agent, v. 22 & 23 Vict. c. 35, s. 24.

(c) s. 27.

(d) s. 1.

(e) 43 & 44 Vict. c. 33, s. 4.

Notwithstanding the comprehensiveness of these provisions, it will be well in some cases to add a count to the indictment describing the property stolen as so much paper, &c. ; for example, if only half a note is stolen (*a*). Notes, &c., sometimes to be described as paper.

It will be convenient to notice here the other exceptional cases of stealing written instruments.

Wills.—To steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, either during the life or after the death of the testator, the whole or any part of any will, codicil, or other testamentary instrument, whether of real or personal property, is a felony, punishable by penal servitude to the extent of life. The criminal proceeding does not affect the civil remedy ; and no person is liable to be convicted if, before he is charged with the offence, he has first disclosed such act on oath in consequence of the compulsory process of a court of law or equity, or in compulsory examination or deposition in bankruptcy or insolvency (*b*). Wills.

Records.—To steal, or for any fraudulent purpose to remove, or to unlawfully and maliciously injure, obliterate, &c., records, writs, affidavits, orders, or other original documents belonging to a court of record, or relating to any matter, civil or criminal, depending in any such court, or any document relating to the business of any office, or employment under Her Majesty, and being in any office appertaining to any court of justice, or in any government, or public office, is a felony punishable by penal servitude to the extent of three years (*c*). Records.

(*c*) A third exclusion of the common law is of *things which are not the subjects of property at all*. A third exclusion.

The chief example of this is in the case of certain animals. But, in addition to these, in certain other

(*a*) *R. v. Mead*, 4 C. & P. 535.

(*b*) s. 29. This provision as to non-liability refers also to the cases of documents of title to lands, v. p. 193.

(*c*) s. 30. v. *R. v. Bailey*, L. R. 1 C. C. R. 347 ; 41 L. J. (M.C.) 61.

things there is no property, as a corpse. So it was said of treasure-trove (a), waifs, &c.

Gas, water, and electricity.

Water supplied by a water company to a consumer, and standing in his pipes, is a subject of larceny at common law (b); so also is gas (c). To maliciously or fraudulently abstract or divert electricity is by statute punishable as larceny (d).

Animals, when the subjects of larceny.

Animals.—At common law there can be no larceny of animals in which there can be no property. Such are beasts that are *feræ naturæ* and unreclaimed, e.g., deer, hares, or conies in a forest, chase, or warren; fish in an open river or pond; or birds at their natural liberty; and this notwithstanding that the right to take the animals in the particular place is enjoyed exclusively by one or more persons. Thus it is not larceny to shoot and take a hare on another person's land; the offence will be one against the Game Laws. On the other hand, *dead* animals, whether to be used for food or not, may be the subjects of larceny. But where the killing and the taking are both by the accused, the rule noticed above as to a break in the proceedings by abandoning possession must be borne in mind (e).

Again, if the animals are evidently reclaimed, or are practically under the care and dominion of any person, and may serve for food (e.g., pheasants in a pheasantry), they may be the subjects of larceny. So, also, valuable domestic animals, as horses; and all animals *domitæ naturæ* which serve for food, as swine, poultry, and the like; and the products of any of them, as eggs, milk, wool, &c. But other animals which do not serve for food

(a) But v. p. 59. It is, however, a misdemeanor to disinter a dead body for the purpose of dissection, or to sell it for gain or profit. *R. v. Lynn*, 2 T. R. 733.

(b) *Ferens v. O'Brien*, L. R. 11 Q. B. D. 21; 52 L. J. (M.C.) 70; 31 W. R. 643.

(c) *R. v. White*, Dears. C. C. 203; 22 L. J. (M.C.) 123.

(d) 45 & 46 Vict. c. 56, s. 23.

(e) v. p. 192. *R. v. Read*, L. R. 3 Q. B. D. 131; 47 L. J. (M.C.) 50.

are not the subjects of larceny at common law, *e.g.*, dogs, bears, foxes, &c., though they may be recovered in a civil action.

Such is the common law ; it has been thus modified by statute :—

a. Deer.—To unlawfully and wilfully course, hunt, ^{Deer.} snare, carry away, or kill or wound, or attempt to kill or wound, any deer kept in an uninclosed part of a forest, chase, or purlieu, is punishable, on summary conviction, by a penalty not exceeding £50. The second offence is a felony, punishable by imprisonment not exceeding two years (*a*). If the deed is done in an enclosed place, the first or any offence is a felony, punishable by imprisonment not exceeding two years (*b*). To have in possession, without satisfactorily accounting for the same, any deer, or the head, skin, or other part thereof, or a snare or engine for taking deer (*c*), or to set or use any such snare, or destroy any part of the fence of any land where any deer are kept (*d*), is punishable, on summary conviction, by a fine of £20.

β. Hares and Rabbits.—To unlawfully and wilfully, ^{Hares and rabbits.} between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in a *warren* or ground (whether enclosed or not) lawfully used for the breeding or keeping of hares or rabbits, is a misdemeanor. To do the above at any other time, or at any time to set a snare, is punishable, on summary conviction, by a penalty not exceeding £5 (*e*).

γ. Fish, &c.—To unlawfully and wilfully take or ^{Fish.} destroy any fish in any water adjoining or belonging to the dwelling-house of the owner of such water is a misdemeanor ; to do so in water not so situated, but which is private property, or in which there is any private right of fishery, is punishable, on summary conviction, by a penalty

(*a*) s. 12.

(*d*) s. 15.

(*b*) s. 13.

(*e*) s. 17.

(*e*) s. 14.

not exceeding £5 above the value of the fish (*a*). This provision does not apply to taking fish by angling in the daytime, which in all cases is only punishable by fine.

Oysters.

To steal any oysters or oyster brood from any oyster bed or fishery, being the property of any other person, and sufficiently marked out, or known as such, is a felony punishable as in the case of simple larceny. To use any net, instrument, &c., for taking oysters, or to drag upon the ground of such fishery, whether any oysters are taken or not, is a misdemeanor, punishable by imprisonment not exceeding three months (*b*).

Dogs.

δ. *Dogs*.—Stealing a dog is punishable, on summary conviction, by imprisonment not exceeding six months, or with a penalty not exceeding £20 above the value of the dog. A second offence is a misdemeanor, punishable by imprisonment not exceeding eighteen months (*c*). The same consequences, without the alternative of imprisonment for the first offence, attend the unlawfully having possession of a stolen dog or its skin, knowing it to have been stolen (*d*). To corruptly take money for aiding any person to recover a dog stolen or in the possession of any person not the owner thereof, is a misdemeanor punishable by imprisonment not exceeding eighteen months (*e*).

Horses and cattle.

ε. *Horses, Cows, Sheep, &c.*—One reason for increasing the severity of the punishment is the ease with which the crime can be committed, so that the deterrent effect of the consequences may be proportioned to the inducements to commit it. On this account the punishment imposed by statute for stealing any of these animals exceeds that for simple larceny at common law.

To steal a horse, mare, gelding, colt, filly ; bull, cow,

(*a*) s. 24.

(*b*) s. 26 ; see also 31 & 32 Vict. c. 45, pt. 3, ss. 25, 42, 43, 51, 52, 55 ; also 47 & 48 Vict. c. 27.

(*d*) s. 19 ; see also s. 22.

(*c*) s. 18.

(*e*) s. 20.

ox, heifer, calf; ram, ewe, sheep, or lamb, is a felony, punishable by penal servitude to the extent of fourteen years (a).

To wilfully kill any animal, with intent to steal the carcass, skin, or any part, is a felony, punishable as if the offender had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have been felony (b). Killing with intent to steal the carcass, &c.

Further, with regard to the goods.—As a rule, the *value* of the thing stolen is no longer of any moment in larceny; except, indeed, where some amount is specially mentioned in the statute as of the essence of the crime, for example, in the case of trees (c); or where the value of the thing determines whether the case may be dealt with in a summary way (d). But now in ordinary cases no statement of value or price is necessary in the indictment (e). Formerly it was otherwise. There was a division into *grand* and *petty* larceny; the former comprising cases of larceny of goods of the value of twelve pence and upwards; such offences being attended with more serious punishment than petty larcenies, which comprised cases of theft where the value did not reach that sum. But this distinction is abolished, and every simple larceny is of the same nature, and subject to the same incidents, as grand larceny was formerly (f). Though, to make a thing the subject of an indictment for larceny, it must be of *some* value, yet it need not be of the value even of a farthing (g). Value of the goods stolen.

As to the description of the *ownership* of the goods.—The name of the owner must be given in the indictment, unless it be one of those cases in which the statute expressly declares this unnecessary, *e.g.*, of wills (h). In other than these exceptional cases it must be proved that Ownership of the goods.

(a) s. 10. (b) s. 11. (c) ss. 32, 33; v. *supra*, p. 193.
 (a) 42 & 43 Vict. c. 49, s. 12, and Sched. I.
 (e) 14 & 15 Vict. c. 100, s. 24.
 (f) 7 & 8 Geo. 4, c. 29, s. 2, re-enacted by 24 & 25 Vict. c. 96, s. 2.
 (g) *R. v. Morris*, 9 C. & P. 349. (h) s. 29.

the goods stolen are the absolute or special property of the person named in the indictment (a).

ii. *The wilfully wrongful taking possession.*

The wrongful taking must be "wilful."

The object of inserting "wilfully" before the "wrongful taking" is to distinguish the wrongful taking which constitutes larceny from the wrongful taking which merely affords ground for a civil action. Thus a person who takes the goods of another under an illegal distress but imagining that he has the right to do so, is liable to civil but not to criminal proceedings. In any case, if the taking is under colour of right, though the supposed right be without foundation, there is no larceny (b).

The taking, actual or constructive.

The taking is either actual or constructive: *Actual*, when the thief directly takes the goods out of the possession of the owner or his bailee *invito domino* (c), by force or by stealth: *Constructive*, when the owner delivers the goods, but either does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by a trick and in pursuance of a previous intent to steal them (d).

Constructive taking.

The law on *constructive taking* may be considered under the following heads:

(a) Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also.

(b) Where the possession has been obtained *animo furandi*.

(c) Where the possession was originally obtained *bond fide*, and without a felonious intent.

(a) As to the person in whom the ownership must be laid, v. p. 326.

(b) v. p. 209.

(c) A slight apparent exception to the rule, that the taking must be *invito domino*, occurs in the case of the owner receiving intimation of the proposed theft, and resolving to allow it to be carried out in order to convict the thief, *R. v. Eggington*, 2 Leach, 913.

(d) Arch. 385. From this work is also taken the immediately following classification of cases.

(d) Where the delivery does not alter the possession in law.

Dealing first with—

(a) *Where the right of property as well as the possession is intentionally parted with by the delivery*, there can be no larceny, however fraudulent are the means by which the delivery of the goods is procured. Of course the person who committed the fraud is open to a charge for another offence, namely, obtaining goods by false pretences. If the property has once passed, no subsequent act by the person in whom the right of property has vested can be construed into larceny, whatever the intent of that person may be. Thus A. buys a horse from B., mounts it, says he will return immediately and pay, intending all the time to defraud the seller. B. says, "Very well." A. rides away and never returns. There is no larceny, because the property as well as the possession is parted with (a). So in all cases of selling on credit.

Property as well as possession parted with.

It is the same if the property is passed by the servant of the owner, provided that the servant has authority to part with the property; but not if he has authority to part merely with the possession. Thus, if the servant of B. is authorised only to let out horses on hire, and he, in the case given above, parts with the property in the animal to A., it is larceny in A. (b).

Authority of servant to part with property and possession.

(b) *Where the possession of goods is obtained animo furandi* (c), by the offender employing some trick or device; the owner not intending to part with the property in the goods, though he does with the temporary possession. This is larceny, though there be a delivery in fact. Thus, A. goes to B.'s shop, and, with the intention of stealing the goods, says that C. wants some shawls to look at, which is untrue. B. gives A. some shawls for C. to select from. A. converts them to

Possession obtained, animo furandi, by a trick.

(a) *R. v. Harvey*, 1 Leach, 467.

(b) *v. R. v. Middleton*, L. R. 2 C. C. R. 38; 42 L. J. (M.C.) 73; 28 L. T. (N.S.) 777; Warb. L. C. 155.

(c) As to what constitutes *animus furandi* or felonious intent, v. p. 209.

her own use. This is larceny in A., because B. only intended to part with the possession and not the property until the selection was made (a).

Ring-dropping. Another example of larceny of this class is the practice of "ring-dropping." The prisoner pretends to find a ring wrapped in paper appearing to be a jeweller's receipt for a "rich brilliant diamond ring." He, with his accomplices, offers to leave the ring with the victim if the latter will deposit his watch or some money as security for the return of the ring. The watch or money is taken away by the prisoner's party, and the victim finds that the value of the ring is much below that of the goods he has parted with (b). The fact that there is an actual delivery of goods does not divest the deed of the character of larceny, if the defendant, having the *animus furandi*, obtains them by frightening or threatening the owner, as, for example, in mock auctions (c). And if menaces are used to extort an excessive price it is immaterial that some money is at the time owing from the prosecutor to the prisoner (d).

Welshing. What is known as "welshing" falls also within the category of larcenies by trick. In one of these cases the prisoner, who occupied a betting-stand at a race meeting, just before one of the races was run, obtained from the prosecutor, who made with him two bets, two sums of five shillings, on the representation that if the horse which the prosecutor backed won, he would receive back the moneys deposited and more besides; and the horse which was backed did win, but the prisoner during the race went off with the money, and when later in the day found by the prosecutor, declined to pay, this was held to be larceny, inasmuch as the prosecutor never intended to part with the property in the money,

(a) *R. v. Savage*, 5 C. & P. 143. (b) *R. v. Patch*, 1 Leach, 238.
 (c) *R. v. M'Grath*, L. R. 1 C. C. R. 205; 39 L. J. (M.C.) 7; 21 L. T. (N.S.) 543; 18 W. R. 119; Warb. L. C. 147.
 (d) *R. v. Lovell*, L. R. 8 Q. B. D. 185; 50 L. J. (M.C.) 91; 44 L. T. (N.S.) 319.

except in a certain event, which did not happen, and there was evidence of a preconcerted design on the part of the prisoner to get the prosecutor's money, by a fraud and a trick (a). Again, where the prisoner agreed to sell a horse to the prosecutor for £23, of which £8 was paid at once, the agreement being that the balance should be paid on delivery of the horse, but the prisoner drove the horse away and never delivered it, it was held that the prisoner was rightly convicted of larceny of the £8, as the prosecutor only paid it as a deposit and did not intend to part with his property in it except upon condition that he received the horse (b). Many cases under this head which have been decided to be larceny show how very narrow the line is between this offence and that of obtaining by false pretences. The true distinction between them is, that in the former case the owner does not intend to part with the property in the goods, but in the latter he does, as a rule, mean to part with it. v. p. 236.

(c) *Where the possession of the goods is obtained lawfully and bona fide, without any fraudulent intention in the first instance.*—Though the person thus obtaining possession afterwards fraudulently appropriated the goods to his own use, he would not be guilty of larceny at common law. Possession at first obtained bona fide and lawfully.

In accordance with the above rule, in no case of bailment where the possession was at first obtained innocently, could the bailee formerly be found guilty of larceny. But the legislature has interfered, and enacted that the fraudulent taking or converting any chattel, money, or valuable security by the bailee of such property to his own use, or to the use of some other person than the owner, although he do not break bulk or otherwise determine the bailment, shall be larceny (c). A man Bailment.

(a) *R. v. Buckmaster*, L. R. 20 Q. B. D. 182 ; 57 L. J. (M.C.) 25 ; 57 L. T. (N.S.) 720 ; 36 W. R. 701 ; Warb. L. C. 166.

(b) *R. v. Russett*, L. R. [1892], 2 Q. B. 312 ; 67 L. T. (N.S.) 124 ; 40 W. R. 592 ; 56 J. P. 743.

(c) s. 3. See *R. v. Tomkinson*, 14 Cox, 603.

can, as a rule, only be convicted of larceny as a bailee when the contract of bailment is that he should deliver back the very same chattel or money which was entrusted to him (*a*). But this rule has been somewhat extended so as to include cases where goods have been intrusted to a man for sale and he has converted the proceeds to his own use; and, conversely, where money has been put into his hands to buy goods and he has appropriated the goods. In such cases the person committing the offence may be convicted of larceny as a bailee (*b*).

A somewhat common instance of larceny by a bailee may be mentioned. If furniture be hired under a contract on the hire and purchase system, and the hirer remove and sell it without the knowledge or consent of the person from whom it is hired, he is guilty of this offence (*c*).

In order to justify a conviction there must not only be evidence that the prisoner converted the goods to his own use but the jury must be satisfied that he did so fraudulently, that is, without any claim of right and with the intention permanently to deprive the owner of his property. For instance, the mere fact that the prisoner pawned the goods is not of itself sufficient, as he may have intended to redeem them, but no doubt when taken into consideration with other circumstances, as, for instance, when there are repeated pawnings, it may be evidence upon which a jury may find that there was a fraudulent intention (*d*).

As we shall see, the Larceny Act deals specifically with the cases of certain persons who are intrusted with money or goods, *e.g.*, as banker, broker, &c. Other cases

(*a*) *R. v. Hassell*, 30 L. J. (M.C.) 175; 4 L. T. (N.S.) 561; 9 W. R. 708; 8 Cox, 372.

(*b*) *R. v. De Banks*, L. R. 13 Q. B. D. 29; 53 L. J. (M.C.) 132; 33 W. R. 722; Warb. L. C. 164; *R. v. Bunkall*, 33 L. J. (M.C.) 75; *R. v. Holloway (Governor)*, ex parte *George*, 66 L. J. (Q. B.) 830; 77 L. T. 247; 18 Cox C. C. 631.

(*c*) *R. v. Macdonald*, L. R. 15 Q. B. D. 323; 52 L. T. (N.S.) 583; 33 W. R. 735.

(*d*) *R. v. Wynn*, 16 Cox, 231; Warb. L. C. 161.

of fraudulent appropriation by those to whom property has been delivered by some other person than the person who is wrongly deprived, will be considered under the heading "embezzlement" (a).

(d) *Where the delivery does not alter the possession in law*, in other words, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him, the goods may be stolen by the person to whom they are thus delivered. Thus it is larceny at common law for a servant who has merely the care and oversight of the goods of his master, as the butler of the plate, to appropriate those goods. And here the felonious intention need not exist at the time of the delivery, inasmuch as the delivery is merely for custody, the possession legally remaining in the master. The master must have been in possession; for if the goods are delivered to the servant for the master's use, and the servant does not deliver, but converts them to his own use, this is not larceny, but embezzlement; as if a shopman receives money from one of his master's customers, and, instead of putting it into the till, secretes it (b).

There are other cases in which the possession, though physically parted with, still remains unmoved in the eye of the law. For example, when the owner is present all the time the goods are in the physical possession of the accused, and has no intention of relinquishing his dominion, as when a lady handed a sovereign to the prisoner, asking him to procure her a ticket, and he ran off with it: he was convicted of larceny (c).

So a bare use of the goods of another does not divest the owner of his possession in law. Thus it is larceny for a person to fraudulently convert to his own use the plate he is using at an inn (d).

(a) As to larceny by tenants or lodgers, v. p. 212.

(b) *R. v. Bull*, 2 Leach, 841.

(c) *R. v. Thompson*, 32 L. J. (M.C.) 53; 7 L. T. (N.S.) 393; 11 W. R. 41.

(d) A reference to the explanation of the term "possession" (p. 191) will show that in the above cases the owner in strictness has not parted with the possession.

Taking one's
own goods,

The taking must be of another's goods. Therefore a person cannot steal his own goods, if they are in his own possession, though he defraud his creditors by the removal; but otherwise, if they are in the hands of a bailee, and the taking of them has the effect of injuring the bailee (*a*).

So, also, if one of several joint-tenants or tenants in common of personal goods disposed of them, it was not larceny at common law, for the disposer was already in possession (*b*). But it has been enacted that if any member of a co-partnership, or one of two or more beneficial owners of property, steals any such property, he is liable to be dealt with and convicted as if he had not been in such position (*c*).

or those of
one's consort.

At common law husband and wife, being one in law, could not steal each other's goods; so that if the goods of the husband were taken with the consent or privity of the wife, it was not larceny, unless the taker was the adulterer of the woman (*d*). And so the adulterer could not be convicted merely of receiving the goods of the husband which had been taken by the wife alone and received by him from the wife, if he were no party to the stealing (*e*). But now by the Married Women's Property Act, 1882, every woman, whether married before or after that Act, has in her own name, against all persons, including her husband, the same remedies and redress by way of criminal proceedings, for the protection and security of *her own separate property*, as if such property

(*a*) *v. R. v. Wilkinson*, R. & R. 470.

(*b*) This does not apply to corporations, because in them individual members have not the right of possession or property.

(*c*) 31 & 32 Vict. c. 116, s. 1. A partnership has been defined by the Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 1), to be "the relation which subsists between persons carrying on business in common with a view to profit;" but it will be seen that the inclusion in the above provision of joint beneficial owners of property will cover the cases of many associations which are not in law partnerships, as they do not exist for the purpose of making profits.

(*d*) *R. v. Tolfree*, 1 Mood. C. C. 243. See also *R. v. Flatman*, 14 Cox, 396.

(*e*) *R. v. Kenny*, L. R. 2 Q. B. D. 307; 46 L. J. (M.C.) 156; 36 L. T. (N.S.) 36; 23 W. R. 679.

belonged to her as a *feme sole* (a). But no such criminal proceeding can be taken by any wife against her husband, while they are living together, concerning any property claimed by her; nor, while they are living apart, as to any act done by the husband while they were living together, concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting his wife (b). In like manner a wife doing any act with respect to any property of her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife, is liable to criminal proceedings by her husband (c). In any such proceedings the husband and wife respectively are competent witnesses and, except when defendant, compellable to give evidence for or against each other (d).

When does the appropriation of things *found* amount to an unlawful and felonious taking? The true rule was laid down in *R. v. Thurborn* (e). “If a man find “goods that have been actually lost, or are reasonably “supposed by him to have been lost, and appropriate “them, with intent to take the entire dominion over “them, really believing when he takes them that the “owner cannot be found, it is not larceny. But if he “take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that “the owner can be found, it is larceny.” Thus to make the finding larceny, there must be on the part of the finder both this belief and this intention at the *time of the finding*.

Appropriation
of things
found, when
larceny.

A somewhat similar but more difficult question arises where money which is not due to a man, or more money

Appropriation
of money paid
by mistake.

(a) *v. R. v. Mayor of London*, L. R. 16 Q. B. D. 772; 55 L. J. (M.C.) 118; 54 L. T. (N.S.) 761; 34 W. R. 544; Warb. L. C. 272.

(b) 45 & 46 Vict. c. 75, s. 12.

(c) *Ibid.* s. 16.

(d) *Ibid.* s. 12; 47 & 48 Vict. c. 14, and 61 & 62 Vict. c. 36, s. 4.

(e) 18 L. J. (M.C.) 140; 2 C. & K. 831; 1 Den. C. C. 387; Warb. L. C. 157; v. also *R. v. Glyde*, L. R. 1 C. C. R. 139; 37 L. J. (M.C.) 107.

than is due, is paid to him by mistake, and he adopts the payment and appropriates the money ; as, for instance, when a sovereign is paid in mistake for a shilling. If in such a case the person receiving the money did so innocently, and was at the time under the same mistake as the person who paid it, he could not be convicted of larceny, although when he subsequently discovered the mistake he fraudulently retained the money (*a*).

But in another somewhat similar case the court, while affirming the principle that the innocent receipt of money, followed after an interval by its fraudulent appropriation, does not constitute larceny, were equally divided in opinion as to whether in that particular case the prisoner could be said to have actually taken possession of the money until he looked at it and saw what it was (*b*).

In a more recent case, however, before the Court for Crown Cases Reserved in Ireland, it was held by five judges against four, that where a man handed to the prisoner a £10 note in mistake for a £1 note, and the prisoner took the note thinking it was a £1 note, and, when he afterwards discovered the error, kept it, that he could not be convicted of larceny (*c*).

If the mistake is only on the side of the person paying the money, and the recipient is at the time fully aware of and takes advantage of it, he is guilty of larceny (*d*).

Asportation. As to the taking *physically* regarded. — In the “taking” we have included what is frequently considered as a separate ingredient of larceny—*carrying away* or *asportation*. This asportation must be proved as well as a bare taking. Thus to handle a bale of

(*a*) *R. v. Flowers*, L. R. 16 Q. B. D. 643 ; 55 L. J. (M.C.) 179 ; 54 L. T. (N.S.) 547 ; 34 W. R. 367.

(*b*) *R. v. Ashwell*, L. R. 16 Q. B. D. 190 ; 55 L. J. (M.C.) 65 ; 53 L. T. (N.S.) 77 ; 34 W. R. 297 ; Warb. L. C. 151.

(*c*) *R. v. Helier* [1895], 2 Ir. 709 ; 18 Cox C. C. 267.

(*d*) *R. v. Middleton*, L. R. 2 C. C. R. 38 ; 42 L. J. (M.C.) 73 ; 22 L. T. (N.S.) 777 ; Warb. L. C. 155.

goods is not larceny; but the slightest removal will suffice to make it so; it is not necessary that the prisoner should succeed in carrying the goods away. Thus, removing the goods from the head to the tail of a waggon, with intent to steal; or, with like intent, drawing a book from a coat an inch above the pocket, though it fall back again, is enough to constitute an asportation (a). But there must be some severance; and, therefore, where the goods could not be carried off because of a string attaching them to the counter, the prisoner was acquitted (b).

Not that in such cases the offender will be altogether out of the reach of the criminal law: he may be indicted for an attempt to steal; or upon the indictment for larceny he may be found guilty of, and punished for, an attempt to steal (c). Attempt to steal.

iii. *The intent permanently to deprive the owner of his property—the animus furandi or felonious intent.*

This is an essential constituent of larceny. Thus, if I take my neighbour's horse out of his stables, and ride it in open day for a few miles, where I am well known, there would be a mere trespass, and no ground for a charge of larceny, however much I may be at enmity with my neighbour. So, also, where goods are taken under a *bona fide* claim of right, however unfounded that claim may be; as if under colour of arrears of rent, although none is actually due, I distrain or seize my tenant's cattle; this may be a trespass, but is no felony. The felonious intent.

(a) *R. v. Thompson*, 1 Mood. C. C. 78.

(b) 2 East, P. C. 556.

(c) v. p. 15; 14 & 15 Vict. c. 100, s. 9. With regard to attempted pocket-picking, it appears now to be the law that an indictment will lie for the attempt, even though the pocket contained nothing which could have been stolen. *R. v. Brown*, L. R. 24 Q. B. D. 357; 59 L. J. (M.C.) 49; Warb. L. C. 16. In this case (which, however, was not one of larceny, and was not argued by counsel) the Court for Crown Cases Reserved expressed its dissatisfaction with the law laid down in *R. v. Collins*, 9 Cox, C. C. 497; L. & C. 471; in which it had been held that under such circumstances a conviction could not be upheld; v. also *R. v. Ring*, 61 L. J. (M.C.) 116; 66 L. T. 300; 56 J. P. 552; 17 Cox, 491; Warb. L. C. 16.

As we have already noticed (*a*), this felonious intent must exist at the time of taking or conversion. The intent must, of course, be inferred from the circumstances of the case: among the more common *indicia* of this felonious intent being the doing the act clandestinely, the denying it when charged, &c. It will be for the jury to decide whether the felonious intent has been proved; or, rather, whether the prisoner has established the absence of such intent; for it is a general presumption of the law that when a man takes unlawful possession of goods belonging to another, his intent is to deprive the owner of them, that is, to steal them, and the proof of justification or excuse will in such a case lie on the accused (*b*). Returning the goods is strong evidence that the intent was not felonious, though it is not conclusive evidence, inasmuch as the prisoner would be convicted if from other circumstances it were proved that the felonious intent was present at the time of taking, though it was afterwards abandoned.

Taking *lucri*
causâ.

It is not necessary that the taking should be *lucri causâ*, or with the object of gain of a pecuniary character. For example, it was held to be larceny for a man to take another's horse, back it into a pit, and thereby kill it, the object here being to screen an accomplice who had been charged with stealing it (*c*). And so a person was convicted of larceny who destroyed a letter in order to suppress inquiries as to her character, which inquiries she supposed were contained therein (*d*). It was formerly held to be larceny for servants to supply their master's horses, &c., with food belonging to the master additional to the quantity usually allowed, even if the intent of obtaining a private benefit (*e.g.*, ease in looking after the horses) was negatived (*e*). Cases of this kind are however now provided for by statute (*f*) which enacts that such conduct shall be punished on summary conviction, by

(*a*) v. p. 203.

(*b*) v. *R. v. Woodfall*, 5 Burr. at p. 2667.

(*c*) *R. v. Cabbage*, R. & R. 292.

(*d*) *R. v. Jones*, 2 C. & K. 236.

(*e*) *R. v. Privett*, 2 C. & K. 114.

(*f*) 26 & 27 Vict. c. 103, s. 1.

imprisonment not exceeding three months, or fine not exceeding £5 ; and that the magistrate may dismiss the case if he thinks it too trifling.

In the same indictment against the same person there may be inserted *several counts* for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts ; and it is lawful to proceed thereon for all or any of them (a). If, at a trial for larceny, it appears that the property alleged to have been stolen at one time was taken at different times, the prosecution is not required to elect upon which taking it will proceed unless it appears that there were more than three takings, or that more than the space of six months elapsed between the first and last of such takings. In either of such last mentioned cases the prosecution is required to elect to proceed for such number of takings, not exceeding three, as appears to have taken place within the period of six months from the first to the last of such takings (b).

More than one count in the indictment, when allowed.

A person indicted for larceny is not to be acquitted because it is proved that he took the money or goods in question under such circumstances as to amount in law to embezzlement, and *vice versa* ; so that the prisoner will be punished for whichever of these crimes he is found guilty by the jury, although he may have been indicted for the other (c).

Conviction for embezzlement on indictment for larceny, and *vice versa*.

As to the *place of trial*.—The thief may be tried in any county of the United Kingdom in which he has any of the stolen property, and this irrespective of the length of time since the commission of the larceny (d), for in the eyes of the law he is guilty of a taking in every county through or in which the goods have been taken by him (e).

Place of trial.

(a) s. 5.

(b) s. 6.

(c) s. 72.

(d) s. 114.

(e) See further as to the place of trial, p. 343 ; restitution of property, p. 446 ; summary jurisdiction in certain larcenies, pp. 479, 482.

Punishment

The punishment for simple larceny, or for any felony made punishable as simple larceny, is—except in cases specially provided for in the Act, or provided for thereafter—penal servitude to the extent of three years (*a*). Additional punishment is awarded in most instances where the offender has been previously convicted, according to rules to be subsequently mentioned (*b*).

The punishment for stealing by any tenant or lodger any chattel or fixture let to be used in or with the house or lodging, is imprisonment not exceeding two years. If the value of the property exceeds £5, penal servitude to the extent of seven years may be awarded (*c*).

Larceny by clerks or servants of money or goods belonging to, or in the possession or power of, their master or employer, is punishable by penal servitude to the extent of fourteen years (*d*).

COMPOUND OR AGGRAVATED LARCENY.

Larceny,
compound or
aggravated.

Larceny attended by circumstances of aggravation is punished more severely than simple larceny. This increased severity is the test to indicate what the law regards as aggravations. In compound larceny all the elements of simple larceny are present; and, in addition to these, the special features which constitute the aggravation. If the prosecution fail to prove such additional circumstances, the prisoner may be found guilty of simple larceny.

Aggravations
enumerated.

“The principal aggravations now in force are either in respect of the *nature of the thing stolen*, as in the case of cattle (*e*), goods in the process of manufacture (*f*), and wills (*g*); or in respect of the *manner* in which they are stolen, as with or without arms and violence (*h*); or in respect to the *place* from which they are stolen, as from the person (*i*), in a dwelling-house to the value of

(*a*) s. 4.
(*d*) s. 67.
(*g*) v. p. 195.

(*b*) v. p. 453.
(*e*) v. p. 198.
(*h*) v. p. 214.

(*c*) s. 74.
(*f*) v. p. 213.
(*i*) v. p. 217.

£5 (a), in a church or chapel (b), from a ship in harbour (c), and from a ship in distress (d); or in respect of the *person* by whom they are stolen, as in the case of agents (e), bankers (f), and fraudulent trustees (g), servants (h), public officers (i), and persons previously convicted (k)."

Some of these have already been noticed; the others now demand our consideration.

(a) *Goods in process of manufacture.*

The goods which are under the protection of the severer penalties are the following: Woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca, or mohair, or of any of these materials mixed with each other or with some other material. The stealing of any of these (to the value of ten shillings) during any stage of manufacture, is punishable by penal servitude to the extent of fourteen years (l).

Larceny of goods in process of manufacture.

(b) *From Vessels, Docks, &c.*

Stealing from vessels, barges, or boats of any description, in a haven, port of entry or discharge, or upon a navigable river or canal, is punishable by penal servitude to the extent of fourteen years. The same punishment attends stealing from a dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin (m).

Larceny from vessels, docks, &c.

(c) *From Vessels in distress or wrecked.*

It was said that at common law there could be no larceny of wrecks, inasmuch as in such a person could not have determinate property. The state of affairs is now completely altered. To plunder or steal any part of a ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any

Larceny from wrecks.

(a) v. p. 254.

(d) *Ibid.*

(g) v. p. 232.

(k) v. p. 453. Fitz. St. 138 (1st edition).

(b) v. p. 253.

(e) v. p. 230.

(h) v. p. 226.

(c) v. *infra*.

(f) *Ibid.*

(i) v. p. 214.

(l) s. 62. (m) s. 63.

kind belonging to such ship or vessel, is punishable by penal servitude to the extent of fourteen years (a).

(d) *By those in the Public Service, or Police Constables.*

Larceny by
public officers.

The nature of their position considerably aggravates the offences of persons who are expected to take the lead in the prevention of crime. For any one employed in the public service of Her Majesty, or in the police, to steal any chattel, money, or valuable security, belonging to, or in possession or power of Her Majesty, or entrusted to, or received or taken into possession by him by virtue of his employment, is punishable by penal servitude to the extent of fourteen years (b).

(e) *Robbery (c).*

Larceny from the person is either by privately stealing or by open and violent assault. The latter, usually termed "Robbery," will be treated of first, the former comprising all other cases of stealing from the person.

Definition of
robbery.

Robbery is the felonious and forcible taking from the person of another, or in his presence, against his will, of any money or goods to any value, by violence, or by putting him to fear by threats of any kind of injury, whether to the person, property, or reputation (d). The rules as to larceny in general apply, and therefore the prosecution must prove the same points as in larceny, and certain others in addition.

The force or
bodily fear.

The gist of the aggravation in this case is the force or bodily fear. It is not necessary to show that both were present. Though no violence was used, it will suffice if it can be proved that the goods were delivered to the prisoner by the party robbed under the impression

(a) s. 64.

(b) s. 69. As to the venue, v. s. 70. Larceny by agents, bankers, trustees, &c., will be noticed under the title "Embezzlement."

(c) As to piracy or robbery on the high seas, v. p. 35.

(d) 2 East, P. C. 707. As to extorting money by means of threats, v. *ante*, p. 95.

of a certain degree of *fear* and apprehension. What is that degree of fear? On the one hand, the fear is not confined to an apprehension of bodily injury, and, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed (*a*). It is not necessary that the danger should be impending on the person of the party robbed; it may be on those dear to him, as his children, or on his house (*b*). It is not however necessary to prove that the fear actually existed, if it be shown that the circumstances were such as were calculated to create a fear of the nature indicated (*c*). And if this be shown, the resort to some pretence by the offender will not divest the act of the character of robbery; as if a person flourishing a sword begs alms; or by the same means compels some one to swear that he will return with money, the fear of the menaces still continuing to operate when the money is delivered.

Though there be no fear, yet if there is actual force or violence, it is a robbery; as where the prisoner knocks down the prosecutor from behind, and steals from him his property while he is insensible on the ground. But the rule appears to be well established that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it (*d*).

The force or fear must precede or accompany the taking, so that a subsequent scuffle or putting to fear in order to keep the property will not constitute a robbery (*e*).

(*a*) *R. v. Donolly*, 2 East, P. C. 713, 715.

(*b*) *R. v. Astley*, 2 East, P. C. 729.

(*c*) Fost. 128.

(*d*) Arch. 476; *R. v. Steward*, 2 East, P. C. 702.

(*e*) *R. v. Gnosil*, 1 C. & P. 304.

The force or violence.

The force, &c., must not be subsequent to the taking.

Possession of
the goods
must be taken.

To constitute a taking, the robber must actually obtain possession of the goods; so that it would not be robbery to cut a man's girdle in order to get his purse, the purse thereby falling to the ground, if the robber was compelled to run off before he could take it up. In the case of simple larceny, there must be some severance of the property. In robbery there must be something more, namely, a complete removal from the person of the party robbed. Removal from the place where it is, if it remains throughout with the person, is not sufficient (a).

The taking
must be from
the person, or
in the presence
&c.

The taking must be *from the person or in the presence* of the party robbed. Thus it is robbery to put a man in fear, and then in his presence to drive away his cattle. So also by threats to compel him to deliver up his property, though the robber never touched his person.

Against the
will.

The taking must be *against the will* of the person robbed. Therefore when the prosecutor, through a third party, procured others to commit a robbery upon him in order that he might get the reward upon the conviction, it was held not to be robbery (b).

Punishment.

Robbery may be punished by penal servitude to the extent of fourteen years (c). If the robbery is accompanied by violence, either at the time of, or immediately before, or immediately after such robbery; or if the robbery, or assault with intent to rob, is by a person armed with any offensive weapon or instrument; or if the robbery or assault with intent to rob is by two or more persons, penal servitude to the extent of life may be awarded (d), and by a later statute, in the case of a male, sentence of private whipping once, twice, or thrice may be added (e).

(a) *R. v. Thompson*, 1 Mood. C. C. 78; but see *R. v. Lapier*, 1 Leach, 320.

(b) *R. v. Macdaniel*, Fost. 121, 128. Cf. *R. v. Eggington*, ante, p. 200; *R. v. Williams*, 1 C. & K. 195.

(c) s. 40.

(d) s. 43.

(e) 26 & 27 Vict. c. 44.

(f) *Stealing from the person.*

Under this head fall all other cases of stealing from the person, not attended by violence or putting to bodily fear, as ordinary pocket-picking. An actual taking must be proved, inasmuch as the nature of the case precludes there being anything like a constructive taking, such as the delivery, &c., in a robbery. Stealing from the person.

The principles of robbery as to the severance, taking, intent, &c., generally apply. The punishment is the same as for simple robbery, namely, penal servitude to the extent of fourteen years (a).

(g) *Assault with intent to rob.*

It seems convenient to notice this offence here, seeing that the evidence upon an indictment for such assault usually proves a robbery with the exception of a taking and carrying away, which for some reason are not effected. No actual violence need be done, but anything done in the presence of the party intended to be robbed, with reference to him, in furtherance of the intent to rob him, will constitute the assault (b). Nor need there be any demand of money, if the intent to rob is proved by other evidence. Assault with intent to rob.

The punishment for this felony (save and except where a greater punishment is provided by the Act) (c), is penal servitude to the extent of three years (d).

If on an indictment for robbery the jury are of opinion that the prisoner did not commit robbery, but did commit an assault with intent to rob, they may find him guilty of the latter offence, and he will be punished accordingly (e). But on an indictment for assault with intent to rob, the defendant cannot be convicted of a common assault (f). Verdict of assault on indictment for robbery.

(a) s. 40.

(c) These cases are noticed above.

(e) s. 41.

(b) Arch. 483. v. p. 176 ante.

(d) s. 42.

(f) R. v. Woodhall, 12 Cox, 240.

LARCENY, ETC., IN RELATION TO THE POST OFFICE.

Post office
offences.

The law on this subject is contained chiefly in the Post Office Act (*a*). Two classes of offences may be distinguished according as the offenders are (*a*) post office *employés*; (*b*) persons generally, whether so employed or not.

(*a*) For a *person employed under the Post Office*.

Offences by
post office
employés.

To steal, or for any purpose whatever embezzle, secrete, or destroy a post letter, is a felony, punishable by penal servitude not exceeding seven years, or imprisonment not exceeding two years. If the letter contains any chattel, money, or valuable security, the punishment is penal servitude to the extent of life, or imprisonment not exceeding two years (*b*).

Contrary to his duty, to open or procure or suffer to be opened a post-letter, or to wilfully detain, delay, or procure to be detained, &c., a post-letter, is a misdemeanor, punishable by fine or imprisonment, or both (*c*). This does not extend to the opening of a letter which is misdirected or refused by the addressee, nor where the opening is authorised in writing by a Secretary of State.

(*b*) For *any person*.

Offences by
any person.

To steal from a post-letter any chattel, money, or valuable security; or to steal a post letter-bag, or a post-letter from a post letter-bag, or from a post office or from any officer of the post office, or from a mail; or to stop a mail with intent to rob or search the same, is a felony, punishable with penal servitude to the extent of life, or imprisonment not exceeding two years (*d*).

(*a*) 7 Wm. 4 & 1 Vict. c. 36. As to punishments v. 47 & 48 Vict. c. 76, s. 13.

(*b*) 7 Wm. 4 & 1 Vict. c. 36, s. 26.

(*c*) *Ibid.* s. 25.

(*d*) 7 Wm. 4 & 1 Vict. c. 36, ss. 27, 28; 47 & 48 Vict. c. 76, s. 13.

To steal or unlawfully take away a post letter-bag sent by a post office packet; or to steal or unlawfully take a letter out of any such bag; or to unlawfully open any such bag, is a felony, punishable with penal servitude to the extent of fourteen years, or imprisonment not exceeding two years (a).

To fraudulently retain, or wilfully secrete, keep, or detain, or neglect or refuse to deliver up when required by an officer of the post office, a letter after it has been delivered by mistake or found, is a misdemeanor, punishable by fine and imprisonment (b).

To solicit or endeavour to procure any other person to commit a felony or misdemeanor, punishable by the Post Office Act, is a misdemeanor, and is punishable by imprisonment not exceeding two years (c).

For any person not employed under the post office to open maliciously and with intent to injure another person, a letter which ought to have been delivered to the latter person, or to do anything whereby the due delivery of such letter is prevented or impeded, is a misdemeanor punishable by a fine of £50, or by imprisonment for six months. This provision does not apply where the person opening or impeding the delivery of the letter stands *in loco parentis* to the person to whom it is addressed, and no prosecution for this offence can be commenced except by the direction of the postmaster-general (d).

The property in the article stolen, whether it be bag, letter, or money, or other goods, is to be laid in the postmaster-general (e).

Property laid
in postmaster-
general.

In connection with this subject, it should be noticed that written or printed messages delivered at a post office for the purpose of being transmitted by a postal telegraph, Telegrams.

(a) 7 Wm. 4 & 1 Vict. c. 36, ss. 29, 41. (b) *Ibid.* s. 31.
(c) *Ibid.* s. 36. (d) 54 & 55 Vict. c. 46, s. 10.
(e) 7 Wm. 4 & 1 Vict. c. 36, s. 40. As to venue, see s. 37.

and every transcript thereof officially made, are deemed post-letters within the above Act (a). For officials of the post office to disclose or intercept telegraphic messages is a misdemeanor, punishable by imprisonment not exceeding twelve months (b).

RECEIVING STOLEN GOODS.

Receiving
stolen goods,
when a felony,
when a misde-
meanor.

The offence of receiving stolen property, knowing it to have been stolen, was at common law a misdemeanor only. By the Larceny Act, 1861, it is made a felony if the principal crime (stealing, &c.) amounts to a felony at common law or by that Act. So that the only case in which receiving still continues a misdemeanor is where the principal crime is not a felony either at common law or by that Act; for example, receiving goods obtained by false pretences, or goods of a partnership stolen by one of the partners, such stealing being felony created by 31 & 32 Vict. c. 116, s. 1 (c), and not a felony at common law.

How a receiver
may be tried
for the felony,
&c.

Receivers where the principal crime amounts to a felony at common law or by the Larceny Act, may be tried in either one of two capacities:—

(i) As accessories after the fact (*i.e.*, of larceny, &c.).

(ii) As committers of a distinct or substantive felony—and in this case, whether the principal has or has not been previously convicted, or even if he is not amenable to justice.

The statute (d) establishing this optional mode of proceeding, enumerates the offenders subject thereto as—those who receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof

(a) 32 & 33 Vict. c. 73, s. 23.

(b) 31 & 32 Vict. c. 110, s. 20. v. 47 & 48 Vict. c. 76, s. 11, as to similar offences by the servants of private telegraphic companies.

(c) *R. v. Smith*, L. R. 1 C. C. R. 266; 39 L. J. (M.C.) 112; 22 L. T. (N.S.) 758; 18 W. R. 932.

(d) s. 91.

amounts to a felony either at common law or by virtue of that Act, knowing the same to have been feloniously stolen, taken, &c.

The larceny or other felonious taking must be proved. ^{The larceny, &c.} For this and every other purpose the principal felon is a competent witness; but of course the jury will form their own opinion as to the weight of his testimony; and if the thief is the only witness, the judge will probably advise an acquittal (a).

If after the larceny the goods have again come into the possession of the rightful owner, who for the purpose of entrapping the supposed receiver allows them to be delivered to him, the latter cannot be convicted of receiving them knowing them to have been stolen (b).

Next it must be proved that the goods were received ^{The receiving} by the prisoner into his actual possession; though a manual possession is not necessary, and a joint possession with the thief is sufficient (c). The goods being found in his possession is good presumptive evidence of his having received them.

The knowledge of the prisoner *at the time he received* ^{The guilty knowledge.} *the goods* that they were stolen, is proved either directly, by the evidence of the principal felon, or circumstantially, as by showing that the prisoner bought them much under their value, denied that he had them in his possession, &c. Evidence may also be given that there was found in his possession at the time when the goods which are the subject of the indictment were found in his possession (d), other property stolen within the preceding twelve months. And again, if evidence has been given that the stolen property has been found in

(a) *R. v. Robinson*, 4 F. & F. 43.

(b) *R. v. Villensky*, L. R. [1892], 2 Q. B. 597; 61 L. J. (M.C.) 218; 41 W. R. 160; 56 J. P. 824; *R. v. Dolan*, Dears. 436.

(c) *R. v. Smith*, 24 L. J. (M.C.) 135; 3 W. R. 384; 6 Cox, 554; 19 Jur. 575.

(d) *R. v. Carter*, L. R. 12 Q. B. D. 522; 53 L. J. (M.C.) 96; Warb. L. C. 197; *R. v. Drage*, 14 Cox, 85.

his possession, at any stage of the proceedings evidence may be given of a conviction, within the five years immediately preceding, of any offence involving fraud or dishonesty. But in this last case seven days' notice in writing must be given to the accused that proof is intended to be given of such previous conviction (a).

Evidence of previous conviction.

The allowing evidence of a previous conviction to be given during the course of a trial, so that it may affect the minds of the jury, is an exception to the usual policy and practice of our criminal law. As a rule, the only influence which a previous conviction is allowed to exert is, after the verdict has been given, in determining the sentence (b).

Punishment for the felony.

The punishment for the felonious receiving is penal servitude to the extent of fourteen years (c). But receiving a post-letter, a post letter-bag, or any chattel, or money, or valuable security, the stealing, or taking or embezzling, or secreting whereof amounts to a felony under the Post Office Act, knowing the same to have been feloniously stolen, &c., and to have been sent or to have been intended to be sent by post, is punishable by penal servitude to the extent of life, or imprisonment not exceeding two years (d).

For the misdemeanor.

Where the principal offence is a misdemeanor by the Larceny Act, *e.g.*, if the property has been obtained by false pretences, the receiver, knowing that the property has been unlawfully stolen, taken, obtained, converted or disposed of, is also guilty of a misdemeanor, punishable by penal servitude to the extent of seven years (e).

For the offence punishable on summary conviction.

Where the principal offence is punishable on summary conviction, the receiver is liable, on summary conviction,

(a) 34 & 35 Vict. c. 112, s. 19.

(b) v. pp. 333, 441.

(c) s. 91.

(d) 7 Wm. 4 & 1 Vict. c. 36, ss. 30, 41; 47 & 48 Vict. c. 76, s. 13.

(e) s. 95.

to the same punishment to which the principal is liable for stealing or taking such property (a).

Contrary to the general rule, which does not admit of different felonies being charged in different counts of the indictment (b), in an indictment for stealing any property it is lawful to add a count or counts for feloniously receiving the same or any part or parts thereof. And conversely, in an indictment for receiving it is lawful to add a count for feloniously stealing the same. It is for the jury to say of which offence they find the prisoner guilty; or if there are more prisoners than one, it is for the jury to say which are guilty of each offence (c).

Count for receiving in indictment for stealing and vice versa.

Any number of receivers, though they received at different times, of property which has been stolen or otherwise disposed of in such manner as to amount to a felony at common law or by the Larceny Act, may be charged with substantive felonies (*i.e.*, of receiving) in the same indictment, and tried together (d). And, in any case, upon the trial of two or more convicted for jointly receiving, the jury may convict one or more of separately receiving (e).

Trial of several receivers.

With a view to the prevention of crimes of this and similar descriptions, it has been provided that any one who keeps a lodging, public, beer, or other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, or a brothel, and knowingly lodges or harbours thieves or reputed thieves, or allows the deposit of goods therein, having reasonable cause for believing them to be stolen, is liable to a penalty not exceeding £10, or, in default of payment, imprisonment not exceeding four months; or instead of, or in addition to such punishment, the court may require him to enter into recognisances for keeping the peace or being of good behaviour. There are also provisions for the forfeiture of licences on conviction for

Penalties on those keeping public places who harbour thieves, admit stolen goods, &c.

(a) s. 97.
(c) s. 92.

(d) s. 93.

(b) v. p. 331.
(e) s. 94.

such conduct (a). Power is given under certain circumstances to search for stolen property, even without a search warrant (b).

Pawnbroker
receiving.

If a pawnbroker is convicted on indictment of receiving stolen goods knowing them to be stolen (or of any fraud in his business), the court may direct that his licence shall cease to have effect (c).

Property
stolen abroad.

When property was stolen abroad no indictment would formerly lie for receiving such property within the jurisdiction, knowing it to have been stolen. But by a recent statute (d) it has been provided that if any person without lawful excuse receives any property stolen out of the United Kingdom, knowing it to have been stolen, he shall be liable to penal servitude to the extent of seven years or to imprisonment with hard labour for not more than two years. This statute extends not only to cases of receiving goods stolen, but also to where the goods have been taken, extorted, obtained, embezzled, converted or disposed of under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of an indictable offence against our law.

Recent possession.

We frequently hear of the so-called doctrine of *Recent Possession*, that is, of the possession of property within a short time after it has been stolen. What is meant is that, according to the circumstances of the case, the recent possession is evidence that the person in possession stole the property, or received it knowing it to have been stolen. This evidence may be of the strongest, or of hardly any weight at all. It will vary not only according to the length of time which may have elapsed between the stealing and the receiving, but also according to other considerations, one of the chief of which is the nature of the property, whether it be of a descrip-

(a) 34 & 35 Vict. c. 112, ss. 10, 11.
(c) 35 & 36 Vict. c. 93, s. 38.

(b) *Ibid.* s. 16.
(d) 59 & 60 Vict. c. 52.

tion which can easily pass from one person to another. Thus the possession of a diamond ring a year after the theft might be more indicative of a felonious receiving than the possession of a pound of cheese after the lapse of a week (a).

(a) *R. v. Partridge*, 7 C. & P. 551; Warb. L. C. 196; *R. v. Langmead*, L. & C. 427; *R. v. Deer*, 32 L. J. (M.C.) 33; 7 L. T. (N.S.) 366; 11 W. R. 43.

CHAPTER II.

EMBEZZLEMENT.

Embezzlement
defined and
distinguished
from larceny.

EMBEZZLEMENT may be defined as the unlawful appropriation to his own use by a servant or clerk of money or chattels received by him for and on account of his master or employer; the term is, however, often applied to frauds by trustees and other persons acting in a fiduciary character. It differs from larceny by clerks or servants in this respect: embezzlement is committed in respect of property which is not at the time in the actual possession of the owner, whilst in larceny it is. An example will illustrate the distinction. A clerk receives £20 from a person in payment for some goods sold by his master; he at once puts it into his pocket, appropriating it to his own use; this is embezzlement. The clerk appropriates to his own use £20 which he takes from the till; this is larceny. The line of demarcation between the two offences appears sometimes to be very finely drawn (*a*). This would be liable to work injustice, were it not for a provision to which we shall shortly have to refer (*b*).

The Larceny Act (*c*) provides that whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security delivered to or received by him in the name or on the account of his master, shall be deemed to have stolen

(*a*) It is urged that there is no ground for preserving the distinction. This would especially be the case if the principle of possession of the servant being the possession of the master had been interpreted with the same latitude in criminal as in civil cases.—Rosc. 446.

(*b*) v. p. 230.

(*c*) 24 & 25 Vict. c. 96, s. 68.

such property although it was not received into the master's possession otherwise than by being in possession of the clerk or servant accused.

The principal points to be noticed are the following :

- (i) Proof that the prisoner was employed as clerk or servant.
- (ii) Proof of his receipt for, or in the name of, or on account of, the employer or master.
- (iii) Proof of the unlawful appropriation.

(i.) *Proof of the Employment as Clerk or Servant.*

It is for the jury to determine whether the prisoner is a clerk or servant within the meaning of the statute, the court explaining what is necessary to constitute such a relation. Employment
as clerk or
servant.

The clerks or servants need not be in the employment of those in trade. The particular name by which they are called, as accountant, collector, overseer, &c., is not material if the general relationship of master and servant can be proved (a). It is sometimes a difficult matter to determine whether the required relationship exists. The employment need not be continuous, for it was held to be embezzlement though the prisoner was employed to receive in a single instance only (b). The mode of remuneration for service is not decisive, that is, whether by commission or by salary. This will not distinguish an agent from a servant (c). Nor will a participation in the profits of the business necessarily prevent the character of servant from arising (d). The question is not decided by the consideration whether the whole or only a part of a man's time is devoted to the other's business (e). Probably

(a) *v. R. v. Squire*, R. & R. 349.

(b) *R. v. Hughes*, 1 Mood. C. C. 370.

(c) *R. v. Bailey*, 12 Cox, 56.

(d) *R. v. M'Donald*, L. & C. 85.

(e) *R. v. Tite*, L. & C. 29; 30 L. J. (M.C.) 142; 4 L. T. (N.S.) 259; 9 W. R. 554; 8 Cox, 458.

the safest criterion is whether the prisoner was bound to obey the prosecutor's orders so as to be under his control, or whether (as is frequently the case with mere commission agents) he was at liberty to work or not as he pleased (*a*); and it has been several times decided that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the Act (*b*).

Embezzlement
by public
officers.

Embezzlement by persons employed in the public service, or by police constables, of any chattel, money, or valuable security, which is intrusted to, or received, or taken into possession by them by virtue of their employment, is subjected to generally the same consequence as if the embezzlement were from an ordinary master (*c*).

(ii.) *The Receipt for, &c., the Master.*

What will
constitute a
receipt for,
&c., the
master.

The mere fact of receipt is usually proved by the person who gave the money, &c., to the prisoner, or by his own admission. That he received it for, in the name of, or on account of his master, the jury may infer from the circumstances of the case. But it will not be embezzlement if the prisoner received the money from his master in order to pay to a third person (*d*). It is immaterial that the money was not really due to the master. The receipt need not now be by virtue of his employment in order to constitute embezzlement; and therefore it may be embezzlement, though the servant had no authority to receive. But it is necessary that the money, &c., should be the property of the master when received by the servant, and therefore money appropriated by a servant in consideration of work which

(*a*) The reader is referred to the cases given by Archbold, Roscoe, &c., for a fuller examination of this question; v. especially *R. v. Negus*, L. R. 2 C. C. R. 34; 42 L. J. (M.C.) 62; 28 L. T. (N.S.) 646; 21 W. R. 687; Warb. L. C. 200.

(*b*) *R. v. Bowers*, L. R. 1 C. C. R. 41; 35 L. J. (M.C.) 206; 14 L. T. 671; 14 W. R. 803; *R. v. Harris*, 69 L. T. 25; 57 J. P. 729.

(*c*) 24 & 25 Vict. c. 96, s. 70. Larceny by the above, v. p. 214.

(*d*) *R. v. Smith*, R. & R. 267.

the prisoner did by the unauthorised use of his master's tools, the payer contracting with the servant only, does not constitute embezzlement (*a*).

(iii.) *The unlawful Appropriation.*

The usual evidence given of the appropriation is, that having received the money, &c., the prisoner denied the receipt, or accounted for other moneys received at the same time, or after, and not for it, or rendered a false account, or practised some other deceit in order to prevent detection. The appropriation.

The mere non-payment to the master of money which the prisoner has charged himself in his master's book with receiving is not by itself a sufficient evidence of embezzlement (*b*). But, on the other hand, it is no defence to merely show that he entered the receipt correctly in the master's book if there be other sufficient evidence of a fraudulent intention (*c*). If, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, he ought not to be convicted of embezzlement (*d*). But where it is the prisoner's duty, at stated times, to account for and pay over to his employer the money received during those intervals, his wilfully omitting to do so is embezzlement, and equivalent to a denial of the receipt of them (*e*).

As the law now stands some specific sum must be proved to have been embezzled. It will not suffice to prove a general deficiency in the prisoner's accounts (*f*). Specific sum to be proved.

There may be charged in the same indictment, and Three acts of embezzlement may be charged.

(*a*) *R. v. Cullum*, L. R. 2 C. C. R. 28; 42 L. J. (M.C.) 64; 28 L. T. (N.S.) 571; 21 W. R. 687. (*b*) *R. v. Hodgson*, 3 C. & P. 422.

(*c*) *R. v. Lister*, D. & B. 118.

(*d*) *R. v. Norman*, C. & Mar. 501.

(*e*) *R. v. Jackson*, 1 C. & K. 384.

(*f*) *R. v. Lloyd Jones*, 8 C. & P. 288; *R. v. Wolstenholme*, 11 Cox, 313; see Rosc. 475.

the defendant may be tried at the same time for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against Her Majesty, or against the same master or employer, within six months from the first to the last of such acts (*a*). As we have already seen, a person indicted for embezzlement may be found guilty of, and punished for, larceny, and *vice versa* (*b*).

Punishment.

Embezzlement by clerks or servants is felony, the punishment being penal servitude to the extent of fourteen years (*c*).

Summary jurisdiction.

The summary jurisdiction given by the Summary Jurisdiction Act, 1879 (*d*), to the justices in petty sessions is the same in cases of embezzlement as in larceny, but does not extend to cases where an actual falsification of accounts is charged.

Falsification of accounts.

Falsification of accounts.

For a clerk, officer, servant, or other *employé* in those capacities, to wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper account, &c., belonging to or in the possession of his employer, or to make false entries therein, is punishable by penal servitude to the extent of seven years (*e*). It is not necessary to allege that any particular person was intended to be defrauded. The offence is a misdemeanor.

Embezzlement by Bankers, Merchants, Brokers, Attorneys, or Agents.

Embezzlement by bankers and others intrusted with property for a special purpose.

If any such person is intrusted with any money or security *with a direction in writing* to apply the same for any specified purpose, or to any specified person, and he, in violation of good faith, and contrary to the terms of such direction, converts the same to his own use, or the

(*a*) 24 & 25 Vict. c. 96, s. 71.

(*b*) *Ibid.* s. 72, v. p. 211.

(*c*) *Ibid.* s. 68.

(*d*) 42 & 43 Vict. c. 49, s. 13; v. p. 479.

(*e*) 38 & 39 Vict. c. 24; v. also *R. v. Butt*, 51 L. T. (N.S.) 607; 15 Cox, 564.

use of any person other than the one by whom he is so intrusted ; or (b) if, having been intrusted as one of the above with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any stock or fund, for safe custody or for any special purpose, without authority to sell, negotiate, transfer, or pledge, he, in violation of good faith, and contrary to the object or purpose for which it was intrusted to him, sells, negotiates, transfers, pledges, or in any manner converts to his own use, or that of some other person than the one by whom he is intrusted, such chattel or security or the proceeds thereof, or the share or interest to which the power of attorney relates, he is guilty of a misdemeanor, and is liable to penal servitude to the extent of seven years (a). There is a saving clause in this section exempting from such liability trustees (who are dealt with in another section) and mortgagees ; also bankers, &c., in receiving money due on securities, or disposing of securities on which they have a lien.

It is a misdemeanor, attended with the same punishment, for a banker, merchant, broker, attorney or agent, with intent to defraud, to sell, negotiate, &c., any property with which he is intrusted for safe custody (b). A solicitor, who is intrusted by a client with moneys to invest, but fraudulently appropriates such money to his own use, is not intrusted with such moneys for "safe custody," within the meaning of the enactment just referred to (c). But if in such a case there is evidence of any direction that the solicitor should keep the money by him until the investment was found, he may be convicted under this section. (d) For any person intrusted with a power of attorney for the sale or transfer of any property to fraudulently sell, transfer, or otherwise convert it to his own

Bankers, &c.,
dealing with
property
intrusted to
them.

(a) 24 & 25 Vict. c. 96, s. 75 ; *R. v. Portugal*, L. R. 16 Q. B. D. 487.

(b) *Ibid.* s. 76.

(c) *R. v. Newman*, L. R. 8 Q. B. D. 706 ; 51 L. J. (M.C.) 87 ; 46 L. T. (N.S.) 394 ; 30 W. R. 550, following *R. v. Cooper*, L. R. 2 C. C. R. 123 ; 43 L. J. (M.C.) 89 ; 20 L. T. (N.S.) 306 ; 22 W. R. 555.

(d) Per Stephen, J., in *R. v. Newman*, *supra* ; *R. v. Fullagar*, 41 L. T. (N.S.) 448.

use, or that of any person other than the one by whom he is intrusted, is a misdemeanor, punishable with penal servitude for seven years (a).

Factors or agents charging property intrusted to them.

Factors or agents intrusted, for the purpose of sale or otherwise, with the possession of any goods or of any document of title to goods, who without the authority of the principal, for their own use or that of any person other than the one by whom they are so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any such goods or document, by way of pledge, lien, or security for any money or valuable security, borrowed by them (the factors, &c.) ; or (b), without authority, &c., accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, &c., such goods or document, are guilty of a misdemeanor, and punished as above. So also are clerks or others knowingly and wilfully assisting in carrying out the aforesaid measures.

Saving clause. A saving clause is added that the factor or agent will not be liable for consigning, depositing, &c., if the property is not made a security for or subject to the payment of any greater sum of money than the amount which, at the time of the consignment, &c., was due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by the factor or agent (b).

Embezzlement by Trustees.

Embezzlement by trustees.

For a trustee of property for the benefit of some other person, or for any public or charitable purpose, with intent to defraud, to convert or appropriate the same to his own use, or that of any other person or purpose than the person or purpose aforesaid ; or (b), to otherwise dispose of or destroy the property, is a misdemeanor punishable by penal servitude to the extent of seven years. But no criminal proceedings may be taken without the sanction of the Attorney-General. And, if civil

(a) 24 & 25 Vict. c. 96, s. 77.

(b) *Ibid.* s. 78.

proceedings have been taken against the trustee, the person who has taken such proceedings may not commence any prosecution under this section without the sanction of the court or judge before whom such civil proceedings have been taken (a).

It must be noticed, however, that the offence only exists where there is an express trust created by some deed, will, or instrument in writing; but the word "trustee" includes a trustee's heir or representative upon whom the trust may have devolved, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer, acting under any Act of Parliament relating to joint stock companies or bankruptcy (b).

Embezzlement by partners and other joint beneficial owners has already dealt with (c).

Embezzlement and other Offences by Directors, Officers, and Members of Public Companies and Corporate Bodies.

The following offences are misdemeanors punishable by penal servitude to the extent of seven years:—

Offences by directors, &c.

(a) For a director, member, or public officer of a body corporate or public company to fraudulently take or apply to his own use, or any use or purpose other than the uses or purposes of such body or company, any of the property of the body or company (d).

Appropriating the common property.

(β) For a director, public officer, or manager of such body or company to receive or possess himself of any of the property of the company, &c., otherwise than in payment of a just debt or demand, and, with intent to defraud, to omit to make or have made a full and true entry thereof in the books and accounts of the company (e).

Receiving without entering in the books.

(γ) For a director, manager, public officer, or member, with intent to defraud, to destroy, alter, mutilate, or

Fraudulent falsification of the books.

(a) 24 & 25 Vict. c. 96, s. 80.

(c) *Ante*, p. 206.

(e) *Ibid.* s. 82.

(b) *Ibid.* s. 1.

(d) 24 & 25 Vict. c. 96, s. 81.

falsify any book, paper, writing, or valuable security, belonging to the body or company ; or (b) to make or concur in making any false entry, or to omit or concur in omitting any material particular in any book of account or other document (a).

Making false statements, &c.

(δ) For a director, manager, or public officer to make, circulate, or publish, or concur in making, &c., any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body or company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body or company, or to enter into any security for the benefit thereof (b).

No prosecution if there has been a disclosure in a civil action.

With regard to these cases of embezzlement by bankers, merchants, attorneys, agents, or factors, trustees, directors, officers, or members of bodies corporate or public companies, the provisions as to which are contained in sects. 75 to 84 of the Larceny Act, it is enacted that a statement or admission made by the accused in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency are not admissible as evidence against him on his prosecution under those sections (c).

Falsification in case of company wound up.

For a director, officer, or contributory of a company wound up under the Companies Act, 1862, to destroy, mutilate, alter, or falsify any books, papers, writings, or securities, or to make or be privy to making any false or fraudulent entry in any book or other document of the company, with intent to defraud or deceive any person, is a misdemeanor, punishable by imprisonment not exceeding two years (d).

(a) 24 & 25 Vict. c. 96, s. 83.

(b) *Ibid.* s. 84.

(c) 53 & 54 Vict. c. 71, s. 27 ; 24 & 25 Vict. c. 96, s. 85. And also nothing in these sections shall entitle any person to refuse to answer a question in a civil proceeding on the ground that it tends to criminate himself.—s. 85. The criminal proceeding is not to deprive any party of his civil remedy, but the conviction is not to be evidence in such civil suit.—s. 86.

(d) 25 & 26 Vict. c. 89, s. 166.

For an officer of a savings bank to receive any deposit Savings banks
and not pay over the same is a misdemeanor, punishable
by fine or imprisonment, or both (*a*).

(*a*) 26 & 27 Vict. c. 87, s. 9. False statements, returns, &c., by railway
companies, v. 29 & 30 Vict. c. 108, ss. 15-17 ; 31 & 32 Vict. c. 119, s. 5 ;
34 & 35 Vict. c. 78, s. 10.

CHAPTER III.

FALSE PRETENCES.

False pre-
tences distin-
guished from
larceny.

It is difficult to correctly define the offence of obtaining property by false pretences. It may be defined to be the offence of obtaining property by means of a false representation made by words, writing, or conduct, that some fact exists or existed (*a*). In some cases, on the one hand, there seems little to distinguish it from larceny; and in others to distinguish it from a mere non-criminal lie. The most intelligible distinction between false pretences and larceny has been thus set forth (*b*): "In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." The line between the two crimes is very narrow. Thus, A. intrusts B. with a parcel to carry to C. D. meets B. and alleges that he is C., whereupon B. gives him the parcel. It will be larceny if B. had not authority to pass the property; false pretences if he had. (*c*) The difficulty of discriminating arises chiefly where there has been a constructive taking only, where the owner delivers the property, though the possession

(*a*) St. Di. 298.

(*b*) Arch. 394, v. *White v. Garden*, 10 C. B. 927.

(*c*) v. *R. v. Watkins*, 1 Leach, 520. It should be observed that in this offence (as in larceny) there must be an intention on the part of the accused to deprive the prosecutor wholly of his property in the goods obtained. If a chattel is borrowed or hired by means of false pretences, the intention being to return it, the offence is not committed. *R. v. Kilham*, L. R. 1 C. C. R. 261; 39 L. J. (M.C.) 109; Warb. L. C. 185. This does not, however, apply to a loan of money obtained by false pretences, as the property in money passes at the time of the lending. *R. v. Crossley*, 2 M. & R. 17; and *R. v. Burgon*, D. & B. 11.

is obtained by fraud. The evil which might arise from this state of things is to some extent obviated by a provision in that section of the Larceny Act under which the offence is punishable, that if upon an indictment for false pretences it is proved that the defendant obtained the property in such manner as to amount in law to larceny, he is not on that account to be acquitted (*a*). Therefore in cases of doubt it is better to indict for false pretences.

The points to be proved on an indictment for false pretences are the following:—

- i. The pretence and its falsity.
- ii. That the property or some part thereof was obtained by means of the pretence.
- iii. The intent to defraud.

i. The pretence must be wholly or in part of an *existing fact*; for example, a false statement of one's name and circumstances in a begging letter. It may be laid down as a general rule of interpretation of the enactment in question that wherever a person fraudulently represents as an existing fact that which is not an existing fact, and so gets money or property, he commits the offence of obtaining by false pretences (*b*). But a mere exaggeration will not suffice, as if a person actually in business pretends that he is doing a very good business (*c*); otherwise, if he were not carrying on any business at all (*d*). The fact must be an *existing fact*; therefore it is not within the Act for a person to pretend that he *will do* something which he does not mean to do (*e*). But where a promise to do a thing is coupled with a false representation by words or otherwise that the promiser has the power to do that thing, an indictment will lie, as, *e.g.*, where the defendant was indicted for

(*a*) 24 & 25 Vict. c. 96, s. 88.

(*c*) *R. v. Williamson*, 11 Cox, 328.

(*e*) *R. v. Lee*, 9 Cox, 304. See also *R. v. Speed*, 46 L. T. (N.S.) 174.

(*b*) Arch. 545.

(*d*) *R. v. Crabb*, 11 Cox, 85.

Pretence must be of an existing fact.

obtaining money from the prosecutrix by stating that he *was* unmarried and *would* marry her and furnish a house for her, it was held that the statement that he was unmarried was sufficient to justify a conviction, although his promise to marry the prosecutrix and to furnish a house would not by themselves have been sufficient (a).

Obtaining additional money by stating that a larger amount of goods is delivered than is known to be the case, is within the statute (b), although it is not every breach of warranty or false assertion at the time of making a bargain which will be treated as a false pretence (c). However, it seems clear that a false representation respecting an alleged matter of definite fact knowingly made is a false pretence within the statute, as, for instance, where the secretary of an Oddfellows' lodge fraudulently tells a member that he owes the lodge a certain sum of money, and thereby obtains that sum from him, whereas in fact the member owed a much smaller sum (d); so also where the prisoner fraudulently alleged that a genuine £1 Irish bank note was a £5 note, and thereby obtained the full value of the latter in change, from which it will be seen that the fact that the person deceived has the means of knowledge in his own power affords no defence to the deceiver (e); again, where the representation is merely as to the *quality* of the goods sold; as when the prosecutor was induced to purchase a chain on the representation that it was fifteen carat gold, whereas it was only six carat (f). But if the representation is only what is matter of opinion, and amounts merely to exaggerated praise, the person making the representation is not criminally liable; as where the defendant said his spoons were as good as and

(a) *R. v. Jennison*, L. & C. 157, Warb. L. C. 175; *R. v. Giles*, 34 L. J. (M.C.) 50. v. also *R. v. Gordon*, 58 L. J. (M.C.) 117; 60 L. T. (N.S.) 872; L. R. 23 Q. B. D. 354.

(b) *R. v. Ragg*, 29 L. J. (M.C.) 86; 1 L. T. (N.S.) 337; 6 Jur. N.S. 178; 8 W. R. 193; 8 Cox, 262.

(c) *R. v. Codrington*, 1 C. & P. 661.

(d) *R. v. Woolley*, 1 Den. 559; 19 L. J. (M.C.) 165.

(e) *R. v. Jessop*, 1 D. & B. 442; 27 L. J. (M.C.) 70.

(f) *R. v. Ardley*, L. R. 1 C. C. R. 301; 40 L. J. (M.C.) 85.

had as much silver in them as Elkington's A spoons (a). Where, however, a hawker induced a person to purchase some packages of tea by representing them to be good tea, and producing samples of good tea, and comparing them with some taken from the packages; but the latter in fact contained to his knowledge only one quarter in weight of tea, the rest being sand, &c., unfit to drink and injurious to health, it was held that he was properly convicted of obtaining money by false pretences (b).

The false pretence need not be expressed in words; ^{The pretence, how expressed.} it will suffice if the pretence is signified in the conduct and acts of the party; for example, by obtaining goods upon giving in payment a cheque upon a banker with whom the defendant has no account, he knowing that it would not be paid on presentation (c); or by a person, who was not a member of the university, obtaining goods fraudulently at Oxford through wearing a commoner's cap and gown (d). So where a farmer, having granted a bill of sale on all the farm stock upon his farm, sold a large portion of such stock without saying anything as to the ownership of it, or as to the existence of the bill of sale, he was held to be guilty of false pretences for the act of selling the stock was in itself a representation that he was the absolute owner (e). But a person who enters a restaurant and orders and consumes refreshments having to his own knowledge no money to pay for them, cannot be convicted of obtaining the food by false pretences, although he is liable to be indicted under the Debtors Act 1869 (f), for obtaining credit by means of a fraud (g).

(a) *R. v. Bryan*, 26 L. J. (M.C.) 84; 3 Jur. N. S. 620; 7 Cox, 313; Warb. L. C. 179.

(b) *R. v. Foster*, L. R. 2 Q. B. D. 301; 46 L. J. (M.C.) 128; 36 L. T. (N.S.) 34; 13 Cox, 393.

(c) *R. v. Jackson*, 3 Camp. 370; v. *R. v. Hazelton*, L. R. 2 C. C. R. 134; 44 L. J. (M.C.) 11; 31 L. T. (N.S.) 451; 23 W. R. 139; Warb. L. C. 172.

(d) *R. v. Barnard*, 7 C. & P. 784; Warb. L. C. 170.

(e) *R. v. Sampson*, 52 L. T. (N.S.) 772; 49 J. P. 807; not following *R. v. Hazelwood*, 48 J. P. 151. v. also *Eichholz v. Bannister*, 17 C. B. (N.S.) 723.

(f) 32 & 33 Vict. c. 62, s. 13—v. p. 108.

(g) *R. v. Jones*, L. R. (1898) 1 Q. B. 119; 67 L. J. (Q. B.) 41; 77 L. T. 503; 46 W. R. 191.

A false pretence may be made through the medium of an innocent agent, and the person who causes it to be made is punishable as if he made it himself.

Where the false pretence is made by means of a public advertisement it will be sufficient to allege in the indictment that the pretence was made to Her Majesty's subjects, provided it is also alleged that by means of that false pretence money was obtained from some particular person, as the general allegation becomes particular as regards the particular person who acts upon it (*a*); but in such a case it would be desirable to add a count stating that the defendant made the false pretence to the person actually defrauded.

Indictment
for forgery.

If the goods are obtained by means of a forged order, note, or other document, the party may be indicted for forgery, the punishment for which offence is more severe. But the prisoner will not be acquitted for the false pretence on the ground that he might have been indicted for forgery (*b*).

The false pretence alleged must be set out in the indictment, but it will suffice if the falsity of the substance of the pretence alleged is proved, although every particular is not established (*c*). In an indictment for *receiving* goods obtained by false pretences it is not necessary to specify by what false pretence the goods were obtained (*d*).

ii. That the property or some part thereof was obtained by means of the pretence.

In other words it must be proved that the goods, &c., stated in the indictment, or some part of them, were obtained from the prosecutor by means of the alleged false pretences (*e*). And the species or class of goods

(*a*) *R. v. Silverlock*, L. R. [1894], 2 Q. B. 766; 63 L. J. (M.C.) 233; 71 L. T. 300; 42 W. R. 608; 58 J. P. 577; Warb. L. C. 187.

(*b*) 14 & 15 Vict. c. 100, s. 12.

(*c*) *R. v. Hill*, R. & R. 190.

(*d*) *Taylor v. Reg.*, L. R. [1895], 1 Q. B. 25; 64 L. J. (M.C.) 11; 71 L. T. 571; 43 W. R. 24.

(*e*) Arch. 558.

must be proved, as laid in the indictment, otherwise, if there be any material variance, the defendant is entitled to an acquittal (a), unless the indictment has been amended, which may be done by leave of the Court (b).

It is no defence to an indictment for obtaining by false pretences that the goods obtained were not in existence at the time when the false pretence was made provided the subsequent delivery of the goods is directly connected with the false pretence, as, *e.g.*, where the defendant by false pretences induced a wheelwright to make him a van which was afterwards delivered to him (c).

If the falsity of the pretence is known to the prosecutor, who, nevertheless, parts with his goods with the intention of entrapping the defendant, or for some other reason, the defendant cannot be convicted of obtaining the goods by false pretences (d). But in such a case he may be convicted upon the same indictment of *attempting* to obtain them (e). Conviction for *attempting* to obtain.

Again where goods are offered to a prosecutor for sale or in pledge and he parts with his money relying, not on the defendant's statements, but upon his own examination of the goods the defendant may be convicted of attempting to obtain money by false pretences, though not of obtaining it, as it was not his false pretence which actually operated upon the prosecutor's mind (f).

iii. *The intent to defraud.*

As in other cases, the intent is generally to be gathered from the facts of the case. It is sufficient to allege in the indictment, and to prove at the trial, an intent to defraud generally, without alleging or proving an intent to defraud any particular person (g). The intent to defraud.

(a) Arch. 361.

(b) 14 & 15 Vict. c. 100, s. 1.

(c) *R. v. Martin*, L. R. 1 C. C. R. 56; 10 Cox, 383; Warb. L. C. 182.

(d) *R. v. Mills*, D. & B. 205; 7 Cox, 263; Warb. L. C. 181.

(e) *R. v. Roebuck*, D. & B. 24; 25 L. J. (M.C.) 101; 14 & 15 Vict. c. 100, s. 9.

(f) *R. v. Roebuck*; sup.

(g) 24 & 25 Vict. c. 96, s. 88.

The intention on the part of the prisoner to pay for goods obtained by false pretences when he might be able to do so, is no defence (*a*), the defendant in such a case having no right to expose the prosecutor to either actual or possible injury by means of the deceit which he practised. A practically conclusive test as to the fraudulent intention of the defendant is: Did he derive any advantage from his false pretence which he knew he could not have had if the truth had been known? If he did, and if thereby the person to whom he made the pretence was exposed to loss, or to risk of loss, it may be safely assumed that the defendant's intention was fraudulent (*b*).

If there be a debt due to the defendant, and he being unable to obtain payment of the same from his debtor, obtains goods from him by false pretences, he does not thereby commit this offence (*c*), there being no real intention to defraud.

Evidence of
other pre-
tences.

It has been held that proof that the defendant has *subsequently* obtained other property from some other person by the same pretence is not admissible as evidence of an intent to defraud (*d*); but that evidence of a similar false pretence on a *prior* occasion is admissible (*e*).

Punishment.

Obtaining property by false pretences is a misdemeanor, punishable by penal servitude to the extent of three years (*f*). It is subject to the provisions of the Vexatious Indictments Act (*g*). As we have seen, the defendant is not entitled to be acquitted for the misdemeanor because the facts show that the offence amounts to larceny; but no person tried for such misdemeanor is

(*a*) *R. v. Naylor*, L. R. 1 C. C. R. 4; 35 L. J. (M.C.) 61; 13 L. T. (N.S.) 381; 11 Jur. N. S. 910; 14 W. R. 58; 10 Cox, 151; Warb. L. C. 177.

(*b*) *v. Stephen's Hist. of the Criminal Law*, p. 122.

(*c*) *R. v. Williams*, 7 C. & P. 354.

(*d*) *R. v. Holt*, 30 L. J. (M.C.) 11; 3 L. T. (N.S.) 310; 6 Jur. (N.S.) 112; 9 W. R. 724; 8 Cox. 411.

(*e*) *R. v. Francis*, L. R. 2 C. C. R. 128; 43 L. J. (M.C.) 97; Warb. L. C. 186.

(*f*) 24 & 25 Vict. c. 96, s. 88.

(*g*) *v. p.* 350.

liable to be afterwards prosecuted for larceny upon the same facts (*a*).

If the offender has not succeeded in obtaining property by means of his false pretences, he may nevertheless be indicted for the attempt (*b*), this being (as are all attempts to commit misdemeanors) a common law misdemeanor.

Winning at play or at wagering by fraud is punishable as for obtaining money by false pretences (*c*).

Receiving.—As to the receiving goods obtained by false pretences, v. pp. 220, 222, 224.

Closely allied to the offence of false pretences is that of *inducing persons by fraud to execute valuable securities*. For any person, with intent to defraud or injure another, by any false pretence to fraudulently cause or induce any person to execute, make, accept, indorse, or destroy the whole or any part of any *valuable security*; or (*b*) to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made, or converted into, or used, or dealt with as a valuable security, is a misdemeanor, punishable as obtaining by false pretences (*d*).

Inducing execution of valuable securities by fraud.

FALSE PERSONATION.

The obtaining goods, money, or other advantage by false personation is a crime similar to false pretences. At common law false personation is punishable as a cheat or fraud; but certain particular cases are dealt with by statute. This crime is also closely connected with

False personation

(*a*) 24 & 25 Vict. c. 96, s. 88; v. *R. v. Bulmer*, 33 L. J. (M.C.) 171; L. & C. 476; 10 Jur. N. S. 684; 10 L. T. (N.S.) 580; 9 Cox, 492.

(*b*) v. p. 430.

(*c*) 8 & 9 Vict. c. 109, s. 17. See also *R. v. O'Connor*, 45 L. T. (N.S.) 512; 46 J. P. 214; 15 Cox, 3.

(*d*) 24 & 25 Vict. c. 96, s. 90.

forgery ; and many statutes providing against forgery at the same time provide against false personation.

of seamen,

Of *seamen, soldiers, &c.*—For a person, in order to receive any pay, wages, prize money, &c., payable, or supposed to be payable, or any effects or money in charge, or supposed to be in charge, of the Admiralty, falsely and deceitfully to personate any person entitled, or supposed to be entitled, to receive the same, is a misdemeanor, punishable by penal servitude to the extent of five years ; or, on summary conviction, by imprisonment not exceeding six months (*a*).

of soldiers,

To knowingly and wilfully personate or falsely assume the name or character of, or to procure others to personate, &c., a soldier or other person who shall have really served, or be supposed to have served, in Her Majesty's army or in any other military service, or his representatives, in order to receive his wages, prize money, &c., due or payable, or supposed to be due or payable, for service performed, or supposed to be performed, is a felony, punishable by penal servitude to the extent of life (*b*). It is no defence to such an indictment that the person was authorised to personate the soldier ; or that he had bought from him the prize money to which the latter was entitled (*c*).

of owners of stock,

Owners of Stock, &c.—To falsely and deceitfully personate the owner of any share or interest in any stock, annuity, or public fund, which is transferable at the Bank of England or Bank of Ireland ; or (*b*) the owner of any share or interest in any capital stock of any body corporate, company, or society established by charter or Act of Parliament ; or (*c*) the owner of any dividend or money payable in respect of any such share or interest, and thereby to transfer, or endeavour to transfer, any such share or interest, or receive, or endeavour to receive,

(*a*) 28 & 29 Vict. c. 124. s. 8 ; v. s. 9.

(*b*) 2 & 3 Wm. 4. c. 53, s. 49 ; 7 Geo. 4. c. 16, s. 38.

(*c*) *R. v. Lake*, 11 Cox, 333.

any money so due, as if the offender were the true and lawful owner, is a felony, punishable by penal servitude to the extent of life (a).

To obtain property in general.—By the False Personation Act, 1874, it is provided that, for any person to ^{of owners of property of any kind.} falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, chattel, money, valuable security, or property, is a felony, punishable by penal servitude to the extent of life (b).

Bail.—Without lawful authority or excuse (which it ^{Personating bail.} lies on the accused to prove), in the name of another person to acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, is a felony, punishable by penal servitude to the extent of seven years (c).

As to personating voters at parliamentary and municipal elections, v. *ante*, p. 79.

CHEATING.

Cheating is a comprehensive term, including in its ^{What cheats are indictable.} wider signification False Pretences, False Personation, and other crimes which are specially provided for. A cheat at common law is the fraudulent obtaining the property of another by any deceitful and illegal practice or token which *affects or may affect the public* (d). Thus, the leading characteristic of such a cheat is the publicity of its consequences. Therefore, a cheat or fraud effected by an unfair dealing and imposition on an individual, in a private transaction between the parties, is not the

(a) 24 & 25 Vict. c. 98, s. 3; v. also National Debt Act, 1870 (33 & 34 Vict. c. 58, s. 4); India Stock (26 & 27 Vict. c. 73, s. 14); Companies Act, 1867 (30 & 31 Vict. c. 131, s. 35).

(b) 37 & 38 Vict. c. 36, s. 1; v. also s. 2.

(c) 24 & 25 Vict. c. 98, s. 34.

(d) 2 East, P. C. c. 18, s. 2.

subject of an indictment at common law (*a*). Indeed, many acts which morally amount to cheating are not punishable at all by the criminal law; the person wronged being left to his remedy by civil action.

Cheats at
common law.

The chief classes of offences regarded as cheats at common law are the following:—

Against public justice, *e.g.*, counterfeiting a discharge from gaol.

Against public health, *e.g.*, selling unwholesome provisions.

Against public economy, *e.g.*, by using false weights or measures (*b*).

There must be a plausible contrivance, as in the last instance, against which common prudence could not have guarded. Thus, though selling by false weights or measures is a misdemeanor, selling under weight, in the absence of actual misrepresentation, is merely actionable.

Deceits
punished by
statute.

Apart from the common law, a number of statutes have been passed to restrain and punish particular deceits, or deceits in particular trades. Amongst the more general we may notice the laws preventing cheating by:—

Counterfeit trade-marks (*c*).

Fraudulent conveyances (*d*).

Punishment.

The general punishment for this misdemeanor is fine or imprisonment, or both.

(*a*) 2 Russ. 463.

(*b*) As to this offence, v. 52 & 53 Vict. c. 21, ss. 3, 4, and 33; also 41 & 42 Vict. c. 49, s. 26, and p. 304, *post*.

(*c*) v. p. 110.

(*d*) 13 Eliz. c. 5; 27 Eliz. c. 4. For other common law cheats, v. 2 Russ. 455, *et seq*.

CHAPTER IV.

BURGLARY, ETC.

THE offence of Burglary (in the strict signification of the term) is thus defined at common law: The breaking and entering of the dwelling or mansion-house of another in the night time with intent to commit a felony therein (a). The limits of burglary proper have been extended; and the punishment of other crimes closely connected with burglary has been also separately provided for by statute. The Larceny Act provides: "Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary" (b). Burglary,
definition at
common law,

by the Larceny
Act.

Four points present themselves for consideration: the time, place, manner, and intent.

i. *Time*.—Formerly great uncertainty existed as to what constituted *night*—whether it was the interval between sunset and sunrise, whether it included twilight, &c. The matter has been settled by statute as far as regards burglary and other offences treated of in the Larceny Act, and the night is deemed to commence at nine o'clock in the evening, and to conclude at six o'clock on the following morning (c). The time.

Both the breaking and the entering must take place at night. If either be in the daytime, it is not burglary.

(a) 3 Inst. 63.

(b) 24 & 25 Vict. c. 96, s. 51.

(c) *Ibid.* s. 1.

But the breaking may take place on one night and the entering on another, provided that the breaking be with intent to enter, and the entering be with intent to commit a felony (*a*).

The place.

ii. *Place*.—It must be the dwelling-house of another. To constitute a *dwelling-house* for the purposes of the statute dealing with burglary and similar offences (the Larceny Act), the house must be either the place where one is in the habit of residing, or some building between which and the dwelling-house there is a communication, either immediate or by means of a covered and inclosed passage leading from the one to the other; the two buildings being occupied in the same right (*b*). It must be the house of *another*; therefore a person cannot be indicted for a burglary in his own house, though he breaks and enters the room of his lodger and steals his goods; but he may be convicted of the larceny (*c*).

The decisions as to what places satisfy the requirements of burglary have been numerous, and, to some extent, conflicting. We may gather the following facts:—

The nature of the building.

The building must be of a permanent character; therefore a tent or booth will not suffice, although the owner lodge there. The tenement need not be a distinct building; thus chambers in a college or inn of court will suffice, provided the occupier resides there (*d*).

What amounts to residence.

As to the nature of the *residence* which is necessary.—The temporary absence of the tenant is not material if he has an intention of returning, though no one be in during the interval. It will suffice if any of the family reside in the house, even a servant (*e*), unless the servant is there merely for the purpose of protecting the

(*a*) *R. v. Smith*, R. & R. 417.

(*b*) *R. v. Jenkins*, R. & R. 224; 24 & 25 Vict. c. 96, s. 53.

(*c*) Kel. 84; 2 East. P. C. 502, 506.

(*d*) 3 Inst. 65; *Fenn v. Grafton*, 2 Bing. N. C. 617.

(*e*) *R. v. Westwood*, R. & R. 495; Warb. L. C. 205.

premises (*a*). It seems that sleeping is necessary to constitute residence (*b*).

In the case of hiring a part of a house, the part let off ^{Where part of the house is let.} may be considered as the dwelling-house of the hirer if the owner does not himself dwell in the house, or if he and the hirer enter by different doors ; that is, of course, provided that the hirer satisfies the other requirements of residence given above. If he does not, the place cannot be the subject of burglary at all ; it is not the dwelling-house of the lodger or tenant, because there is no residence ; nor of the owner, because it is severed by the letting (*c*). But if the owner himself, or any of his family, lie in the house, and there is only one outward door at which they and the lodger enter, the lodger is regarded as an inmate ; and therefore the house must be described as that of the owner (*d*).

At common law a church might be the subject of burglary ; but this case is now specially provided for by statute (*e*).

iii. *Manner*.—There must be both a breaking and an ^{The manner.} entering.

As to the *breaking*.—It must be of part of the house ; ^{The breaking.} therefore it will not suffice if only a gate admitting into the yard is broken. But the breaking is not restricted to the breaking of the outer wall, or doors, or windows ; if the thief gains admission by the outer door or window being open, and afterwards breaks or unlocks an inner door for the purpose of plundering one of the rooms, it is burglary (*f*). This will apply especially to the case of servants, lodgers, &c., who are lawfully in the house. Breaking chests or cupboards does not satisfy the requirements of burglary.

The breaking is either actual or constructive. *Actual,* ^{Actual breaking.}

(*a*) *R. v. Flannagan*, R. & R. 187.

(*b*) *R. v. Martin*, R. & R. 108.

(*c*) *v. Arch.* 571, and cases cited there.

(*d*) *v. R. v. Rogers*, 1 Leach, 89, 428.

(*e*) *v.* p. 253.

(*f*) *R. v. Johnson*, 2 East, P. C. 488.

when the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or undoes any other fastening to doors or windows which the owner has provided (*a*). It is not burglary if the entry is made through an open window or door, or through an aperture (other than a chimney), provided that the thief does not break any inner door (*b*). Nor is raising a window which is already partly open; but it has been decided that lifting the flap of a cellar which was kept down by its own weight was sufficient to constitute burglary (*c*).

Constructive
breaking.

The breaking is *constructive*, where admission is gained by some device, there being no actual breaking. As, for example, to knock at the door and then rush in under pretence of taking lodgings, and fall on and rob the landlord; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. These are breaches sufficient to constitute burglary, for the law will not suffer itself to be trifled with by such evasions (*d*). So for a servant to conspire with a robber, and let him into the house at night, is a burglary in both (*e*). To obtain admission to a house by coming down the chimney is sufficient, for the chimney is as much closed as the nature of things will admit; but getting through a hole in the roof left to admit light is not (*f*).

Entry.

As to the *entry*.—The least degree of entry with any part of the body, or with any instrument held in the hand, will suffice; for example, stepping over the

(*a*) 3 Inst. 64; 1 Hale, P. C. 552; v. *R. v. Smith*, R. & R. 417; *R. v. Hall*, R. & R. 355; *R. v. Smith*, 1 Mood. 178; *R. v. Robinson*, 1 Mood. 327; *R. v. Hyams*, 7 C. & P. 441.

(*b*) 3 Inst. 64; 1 Hale, P. C. 552; *R. v. Lewis*, 2 C. & P. 628.

(*c*) *R. v. Russell*, 1 Mood. C. C. 377.

(*d*) 4 Bl. 226.

(*e*) 1 Hale, 553.

(*f*) *R. v. Brice*, R. & R. 450.

threshold, putting a hook in at the open window in order to abstract goods, but not if the instrument was merely used to effect the breaking, and as a means in itself of taking the goods, as, *e.g.*, a crowbar (*a*).

Though formerly there were doubts on the subject, it is now provided by statute that it is burglary for a person who has entered the dwelling-house of another with intent to commit a felony therein, or for a person who in such dwelling-house (*e.g.*, a servant) has committed a felony therein, to *break out* (*b*). Breaking out.

When the breaking with intent to commit a felony is proved, but there is no proof of entry, the jury may convict the prisoner of an attempt to commit burglary (*c*). Attempt.

iv. The *Intent*.—To constitute a burglary, there must be an intent to commit some felony (not necessarily a larceny) in the dwelling-house, otherwise the breaking and entry will only amount to a trespass (*d*). It must be either proved from evidence of the actual commission of the felony, or implied from some overt act if the felony is not actually carried out. For it is none the less burglary because the felony which is intended is not perpetrated. The nature of the intended felony must be alleged in the indictment. The intent to commit a felony.

Burglary is a felony, punishable by penal servitude to the extent of life (*e*). Punishment.

Certain other crimes connected with the subject of burglary remain to be considered:—

Entering a dwelling-house in the night, with intent to commit a felony—the offence differing from burglary inasmuch as there is no breaking—is a felony punishable by penal servitude to the extent of seven years (*f*). Entering dwelling-house at night with intent, &c.

(*a*) *R. v. Hughes*, 1 Leach, 406; Warb. L. C. 203; *R. v. Rust*, 1 Moo. C. C. 183.

(*b*) 24 & 25 Vict. c. 96, s. 51.

(*c*) *R. v. Spanner*, 12 Cox, 155.

(*d*) 1 Hale, P. C. 561.

(*e*) 24 & 25 Vict. c. 96, s. 52.

(*f*) *Ibid.* s. 54.

Armed at night with intent, &c.

Being found by night armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any dwelling-house, or other building whatsoever, and to commit a felony therein (N.B. An intent either to break or to enter will suffice, also that the offence is not confined to dwelling-houses. Proof must be given of an intent to break into or enter a particular building; proof of a general intent will not suffice (a)) ;

Possession of housebreaking implement by night.

or, being found by night in possession, without lawful excuse, of any housebreaking implement, or being found with the face blackened or otherwise disfigured, with intent to commit a felony ;

Being in dwelling-house, &c.

or, being found by night in any dwelling-house or other building, with intent to commit a felony therein,

is a misdemeanor, punishable by penal servitude to the extent of three years (b). If any of the above misdemeanors be committed after a previous conviction for felony, or after a previous conviction for such misdemeanor, the penal servitude is from three to ten years (c).

HOUSEBREAKING.

Housebreaking distinguished from burglary.

The chief distinction between this crime and burglary is, that the former may be committed by day, the latter by night only. There is also a difference to be noticed as to the structure which may be the subject of the crimes. Housebreaking extends to school-houses, shops, warehouses, and counting-houses, as well as dwelling-houses, also any building within the curtilage of a dwelling-house and occupied therewith, but not being part thereof according to the provision of section 53, noticed above (d).

Nature of the crime.

This crime consists in the breaking and entering any such house with the intention of committing a felony

(a) *R. v. Jarrald*, L. & C. 301; 32 L. J. (M.C.) 258; 9 Jur. N. S. 629; 8 L. T. (N.S.) 551; 11 W. R. 787; 9 Cox, 307.

(b) 24 & 25 Vict. c. 96, s. 58.

(c) *Ibid.* s. 59.

(d) *Ibid.* s. 55; v. p. 248.

therein, or in the case of one being in such house, committing a felony therein, and breaking out of the same. The breaking and entering will be proved as in burglary.

The punishment for this felony varies according to Punishment. whether the projected felony, the object of the breaking, is actually committed, or there is only an intention to commit it coupled with an actual breaking; in the former case the extent of the penal servitude being fourteen years, in the latter seven years (*a*). On an indictment for the former, the prisoner may be convicted of the latter. Also, if the indictment charges the breaking and stealing, if the prosecution fail to prove the breaking, the prisoner may be convicted of larceny in a dwelling-house (*b*), or of simple larceny.

Sacrilege.

Breaking and entering a church, chapel, meeting-Breaking, &c.,
church, chapel
&c. house, or other place of divine worship, and committing a felony therein, or, if already therein, committing a felony and breaking out, is a felony, punishable by penal servitude to the extent of life (*c*). If the projected felony is not actually committed, but the intent to commit is proved, the limit of the penal servitude is seven years (*d*).

The proof is generally the same as that in house-breaking. It seems that any articles stolen need not be such as are used for divine service (*e*).

Larceny in a dwelling-house.

This crime differs from housebreaking inasmuch as Larceny in a
dwelling-
house. there need not be any breaking, nor any entry with a view to the commission of the larceny. As in burglary the building must be proved to be a dwelling-house, or some building occupied therewith or communicating in the manner before described (*f*).

(*a*) 24 & 25 Vict. c. 96 ss. 56, 57.

(*c*) 24 & 25 Vict. c. 96, s. 50.

(*e*) Arch. 458; *R. v. Rourke*, R. & R. 386.

(*b*) v. *infra*.

(*d*) *Ibid.* s. 57.

(*f*) v. p. 248.

Punishment.

Stealing in such dwelling-house any chattel, money, or valuable security to the value in the whole of £5 or more, is a felony, punishable by penal servitude to the extent of fourteen years (*a*). And although the value does not amount to £5, the punishment is the same if the thief by any menace or threat puts any one in the dwelling-house in bodily fear (*b*).

Goods to be under the protection of the house.

The goods must be under the protection of the house, and not in the personal care of the owner. Thus to steal a sum of money from a person's pocket while he is in the house, is not within the statute, unless, indeed, the clothes containing such pocket had been put off, in which case they would be under the protection of the house (*c*). It was decided in the same case that it is a question for the court, and not for the jury, whether the goods are under the protection of the house or in the personal care of the owner. The fact that the larceny was committed in the thief's own house does not take the case out of the statute (*d*).

RECAPITULATION.

Inasmuch as there is great danger of confusion and considerable intricacy in the definitions, it will be well to recapitulate the distinctions between certain crimes partaking of the general character of fraud.

Larceny and embezzlement.

First, as to *Larceny* and *Embezzlement*. The gist of the latter offence is that, in the case of appropriation by a servant or clerk of money or chattels received by him for his master or employer, such money or chattels are not at the time of appropriation in the actual or constructive possession of the master or employer; or, in other words, the prisoner intercepts the property on its way to the possession of the master or employer; but in

(*a*) 24 & 25 Vict. c. 96, s. 60.

(*c*) *R. v. Thomas*, Car. Sup. 295.

(*b*) *Ibid.* s. 61.

(*d*) *R. v. Bowden*, 1 C. & K. 147.

case the property has already reached the master, and the goods are then taken by the servant, his offence is larceny. In more than one direction does this crime very closely border on larceny. Thus difficult points may arise on the questions—whether the appropriator were a servant; whether the master were in possession of the property, &c.

Between *Larceny* and *False Pretences* the main distinction is, that in the former the *property* is not passed by the owner to the thief (and generally the possession is not intended to be passed); while in the latter the property is passed to the defendant, but this is brought about by fraud. Here, again, subtle questions arise as to the authority to pass the property, &c. Larceny and false pretences.

The distinction of *Robbery* from other kinds of larceny is, that in the former case there must have been a felonious taking from the *person* or in the presence of another, accompanied either by *violence* or a *putting to fear*. Robbery.

In *Burglary* there is a limitation in certain respects as compared with simple larceny: as to the *time*, viz., at night; as to the *place*, viz., a dwelling-house; as to the *manner*, viz., the breaking and entering, or breaking out. In one point burglary is wider in its scope—there need not be an actual larceny; it will suffice if there is an intent to commit any felony. Burglary.

Between *Burglary* and *Housebreaking* the distinction is that the former must be committed at night, and is more limited with respect to the buildings which are its subjects. Burglary and housebreaking.

Between *Housebreaking* and *Larceny in a Dwelling-house* there is the distinction as to the breaking, and also as to the building, as to which the latter crime is on the same footing as burglary. Housebreaking and larceny in a dwelling-house.

CHAPTER V.

FORGERY.

Forgery
described.

FORGERY may be described, in general terms, as the false or fraudulent making (or alteration) of an instrument (or part thereof) or of any writing which purports on the face of it to be good and valid for the purposes for which it was created, to the prejudice of another man's right, in other words, with a design or intent to defraud (*a*).

The statute law on this subject is chiefly contained in one of the Consolidated Acts of 1861—The Forgery and False Personation Act (*b*). These laws are not careful to bring themselves within the compass of any definition; and they frequently deal with offences which do not strictly fall under the principal heading. Thus, in the Forgery Act, we shall find noticed many offences which, “though not amounting to forgery, facilitate, or are steps towards the commission of that crime, or are of a somewhat similar nature.”

Forgery and
false pretences.

It may be premised that forgery is very closely allied to obtaining by false pretences (*c*). Indeed, if there were no special provision on the subject, many cases of forgery would be punishable as cases of obtaining goods or money by false pretences. It is needless to say that forgery is treated as a much more serious crime than false pretences.

We shall, in the first place, notice with what instruments

(*a*) v. 2 East, P. C. 991 ; 4 Bl. 247 ; Arch. 648.

(*b*) 24 & 25 Vict. c. 98. When merely a section is quoted in this chapter it must be understood to be a section of this statute.

(*c*) v. p. 240.

the statute deals, and what are left to the punishment at common law; and then examine the nature of the crimes which may be committed with regard to these instruments.

The statute consists of fifty-six sections, of which about half are merely enumerations of particular classes of instruments, as stated below, the *forging*, or *altering*, or the *offering*, *uttering*, *disposing*, or *putting off* (knowing the same to be forged or altered) of which is a felony. In each case, unless otherwise specified, the punishment is penal servitude from three years to life, or imprisonment not exceeding two years:—

Instruments dealt with in the Forgery Act enumerated.

The Great Seal of the United Kingdom; the Queen's Privy Seal; her Royal Sign Manual, &c.; and the uttering of any documents to which any of these forgeries are attached (sect. 1).

Transfer of stock or power of attorney for transferring stock or for receiving dividends (sect. 2).

Attestation to any such power of attorney. Maximum of penal servitude, seven years (sect. 4).

False entry or alteration in the books of the public funds, or false transfer of public stock (sect. 5).

False dividend warrant by *employés* of Bank of England or Bank of Ireland. Maximum, seven years (sect. 6).

East India bonds or assignments thereof (*a*) (sect. 7).

Exchequer bills, bonds, or debentures, or assignments thereof, or receipts for interest thereon (*b*) (sect. 8).

Bank notes, or bank bills, or the endorsement or assignment thereof (sect. 12).

Deeds, bonds, assignments of bonds, or names of attesting witnesses thereto (sect. 20).

(*a*) For statutes dealing with forgery of other East India Securities, v. Arch. 694.

(*b*) See also 29 & 30 Vict. c. 25, s. 15, and 40 & 41 Vict. c. 2, s. 10. Also as to Metropolitan bills, 41 & 42 Vict. c. 37, s. 20.

Wills or codicils (sect. 21).

Bills of exchange, or any acceptance, indorsement, or assignment thereof; promissory notes, or any indorsement or assignment thereof (*a*) (sect. 22).

Undertakings, warrants, orders, receipts, &c., for payment of money (such as cheques on bankers), delivery or transfer of goods, &c. (sect. 23).

Obliterating or altering crossings on cheques (sect. 25).

Debentures. Maximum, fourteen years (sect. 26).

Proceedings, &c., of courts of record, or documents intended to be used as evidence therein. Maximum, seven years (sect. 27).

False copies or certificates of record by an officer of the court; so also for any other person to use such false process. Maximum, seven years (sect. 28).

Instruments made evidence by statute. Maximum, seven years (sect. 29).

Court roll, or copy thereof, relating to copyhold estates (sect. 30).

Certificates and other writings relating to the registry of deeds. Maximum, fourteen years (sect. 31).

Summons, conviction, order or warrant of, or deposition, affidavit, or declaration taken before magistrates. Maximum, three years (sect. 32).

Certificate, name, or signature of Accountant-General in Chancery (*b*), or of any officer of any court. Maximum, fourteen years (sect. 33).

Licence or certificate of marriage. Maximum, seven years (sect. 35).

(*a*) v. s. 24 as to fraudulently making, accepting, &c., any bill, note, &c., by procuration or otherwise, for any other person, without authority; or uttering the same knowing it to have been so made, &c. The punishment is penal servitude to the extent of fourteen years.

(*b*) Now Paymaster-General, 35 & 36 Vict. c. 42, s. 12.

Register of births, baptisms, deaths, marriages, burials(*a*), &c. (sect. 36).

Making false entries in copies of registers sent to registrars (sect. 37).

In addition to the above-mentioned instruments, &c., the forgery of which is dealt with in the Forgery Act, there are other cases provided for by many statutes too numerous to notice. A few of the more important are the following:—

Forgeries dealt with in other statutes.

Stock certificates or coupons, &c., issued by the Bank of England for the payment of interest on the national debt (33 & 34 Vict. c. 58, s. 3, v. also sect. 6).

Inland Revenue stamps (54 & 55 Vict. c. 38, ss. 13–18).

Postage stamps (47 & 48 Vict. c. 76, s. 7).

Election documents (35 & 36 Vict. c. 33, s. 3).

Trade-marks and trade-mark registers (50 & 51 Vict. c. 28; 46 & 47 Vict. c. 57, s. 93) (*b*).

Falsification of accounts by clerks, officers, servants, and other *employés* (38 & 39 Vict. c. 24) (*c*).

Under Land Transfer and Declaration of Title Acts (25 & 26 Vict. c. 67; 38 & 39 Vict. c. 87).

Money orders issued under the Post Office Money Orders Act, 1880 (43 & 44 Vict. c. 33).

Telegrams (47 & 48 Vict. c. 76, s. 11).

Printing Acts, proclamations, &c., falsely purporting to have been printed by the government printer or Her Majesty's Stationery Office, or tendering the same in evidence (31 & 32 Vict. c. 37, s. 4; 45 & 46 Vict. c. 9, s. 3).

Hall marks on gold or silver (7 & 8 Vict. c. 22, s. 2).

(*a*) Destroying or injuring the above, and other offences connected with the same subject, are also dealt with in this section.

(*b*) v. p. 110.

(*c*) v. p. 230.

Forgery at
common law.

So much for forgeries provided against by particular statutes. Forgery at common law is a misdemeanor, punishable by fine or imprisonment, or both. It is only in virtue of the particular statute that any forgery is made a felony. Cases of forgery which have not been specially dealt with by statute are left to their punishment at common law; for example, forging or uttering a testimonial to character in order to obtain an appointment (*a*).

In viewing the crime generally, we shall have to treat of two classes of acts, each entailing the same consequences, and both usually appearing in different counts of the same indictment.

i. The actual forgery.

ii. The knowingly uttering the forged instrument.

The instru-
ment.

i. The *Forgery*.—As to the *instrument* itself. In the case of a statutory forgery the instrument must have some apparent validity, that is, it must purport on the face of it to be good and valid for the purpose for which it is created, so that it may fall under the denominations specified in the particular statute. So that a man cannot be indicted under the Forgery Act for forging a bill of exchange, which, for want of signature, is incomplete (*b*). But in such a case the prisoner may be convicted of a forgery at common law (*c*). There need not be an exact resemblance; it will be sufficient if the forgery is capable of deceiving persons of ordinary observation (*d*). The forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist, is not forgery (*e*).

(*a*) *R. v. Sharman*, Dears, C. C. 285; 23 L. J. (M.C.) 51; 18 Jur. 157; 6 Cox, 312. Forging a servant's character, and giving in writing a false character, are punishable under 32 Geo. 3, c. 56, by a fine of £20.

(*b*) *H. v. Pateman*, R. & R. 455. See also *R. v. Butterwick*, 2 M. & Rob. 196; *R. v. Mopsey*, 11 Cox, 143; and *R. v. Harper*, L. R. 7 Q. B. D. 78; 50 L. J. (M.C.) 90; 44 L. T. (N.S.) 615; 29 W. R. 743; 14 Cox, 574.

(*c*) Per Stephen, J., in *R. v. Harper*, *supra*.

(*d*) *R. v. Collicott*, R. & R. 212; 2 Leach, 1048; 4 Taunt, 300.

(*e*) *R. v. Closs*, Dears. & B. 460; 27 L. J. (M.C.) 54; 4 Jur. (N.S.) 1003; 7 Cox, 494.

As to what *fabrication* will constitute a forgery.—It need not be of the whole instrument. Very frequently the only false statement is the use of a name to which the defendant is not entitled. It does not matter whether the name wrongly applied be a real or a fictitious one (a). And a person may be guilty of forgery by making a false deed in *his own* name, as when a person has made a conveyance in fee of land to A., and afterwards makes a lease for 999 years of the same land to his confederate B., of a date prior to that of the conveyance to A., for the purpose of defrauding A., the latter deed is a forgery (b). Of course the forgery need not be in the name; it may equally be in some other part of the instrument. For example, it is forgery to fill in without authority a form of cheque already signed, with blanks left for the insertion of the sum (c).

Nature of the fabrication.

Not only a fabrication, but even an *alteration*, however slight, if material, will constitute a forgery; for example, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale* by changing the D to S (d); making a bill of exchange for £8 appear to be for £80 by adding a cipher (e).

An alteration will suffice.

For the purpose of proving that the alleged forgery was not written by the person in whose handwriting it purports to be, the best evidence is the denial of such person on his being produced as a witness. Whether he be or be not called as a witness, the handwriting may be proved not to be his by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him (f). It is also provided by statute that comparison of a disputed writing with *any* writing proved to the satisfaction of the judge to be genuine, may be made by witnesses; and that such writings and the evidence of witnesses concerning

Evidence as to the writing.

(a) *R. v. Lockett*, 1 Leach, 94; 2 East, P. C. 940.

(b) *R. v. Ritson*, L. R. 1 C. C. R. 200; 39 L. J. (M.C.) 10; 21 L. T. (N.S.) 437; 18 W. R. 73; 11 Cox, 352.

(c) *Flower v. Shaw*, 2 C. & K. 703.

(e) *R. v. Elsworth*, 2 East, P. C. 986.

(d) 1 Hawk. c. 70, s. 2.

(f) v. p. 435.

the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute (*a*). The witness need not be a professed expert in handwriting (*b*). It appears not to be settled whether an expert may give evidence as to whether the writing is in a feigned hand merely from its appearance (*c*). It is sufficient to disprove the handwriting of the person, and he need not necessarily be called to disprove an authority to others to use his name; circumstances showing guilty knowledge on the part of the prisoner are enough (*d*).

The intent to defraud.

As to the *intent* to defraud. It is not necessary to prove an intent to defraud any particular person; it will suffice to prove generally an intent to defraud (*e*). So it need not appear that the prisoner had any intention ultimately to defraud the person whose signature he had forged, he having defrauded the person to whom he uttered the instrument (*f*). And it is not necessary that any person should be actually defrauded, or that any person should be in a situation to be defrauded by the Act (*g*).

The uttering.

ii. The *Uttering*.—In an indictment for forgery it is usual to add a second count, charging the prisoner with knowingly uttering the forged instrument. So that if the prosecution fail to prove the actual forgery, the prisoner may be convicted of the uttering.

Under the Forgery Act a tender will suffice.

The words of the Consolidation Act, which deals with all instruments in ordinary use, are, “offer, utter, dispose of, and put off.” Therefore, in cases falling within that statute, it will suffice if there be a tender, or attempt to pass off the instrument; there need not be an acceptance by the person to whom it is offered (*h*).

(*a*) 28 Vict. c. 18, s. 8.

(*b*) *R. v. Silverlock*, L. R. [1894], 2 Q. B. 766; 63 L. J. (M.C.) 136; 71 L. T. 300; 42 W. R. 608; 58 J. P. 577; Warb. L. C. 187.

(*c*) See cases in Arch. 312; Rosc. 165; 3 Russ. 610.

(*d*) *R. v. Hurley*, 2 M. & Rob. 473.

(*e*) s. 44.

(*f*) *R. v. Trenfield*, 1 F. & F. 43.

(*g*) *R. v. Nash*, 2 Den. C. C. 503; 21 L. J. (M.C.) 147; 16 Jur. (N.S.) 553.

(*h*) v. Arch. 649.

It is an uttering if the forged instrument is used in any way so as to get money or credit by it, or by means of it, though it is produced to the other party, not for his acceptance, but for some other purpose; for example, for inspection, as where the prisoner placed a forged receipt for poor-rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his poor rates, fraudulently to induce the other to advance money to a third person (a). It is immaterial that the uttering was only conditional.

Object of the uttering.

Of course the forged character of the instrument, and the intent to defraud, must be proved, as on the first count for the forgery. It will be also necessary to prove that the defendant *knew* the instrument to be forged. This point is not always capable of direct proof, but may be presumed from the facts of the case; for example, on its appearing that the prisoner had in his possession other forged documents of the same kind. To prove the *scienter* or guilty knowledge, evidence may be given that the defendant had passed other forged notes, &c.; and it has been decided that evidence may be given of a subsequent uttering, even though that subsequent uttering be made the subject of a distinct indictment (b).

Guilty knowledge of the utterer.

As we have already observed, the Forgery Act deals with other offences of a kindred nature. Of these the following are the chief:—

Relating to Exchequer Bills, Bonds, Debentures, &c. (c).— Making, or knowingly having, without lawful authority or excuse, plates, or other implements in imitation of those peculiarly used for manufacturing such bills, &c., is a felony, punishable by penal servitude to the extent of seven years (d).

Exchequer bills, &c.
Making plates &c.

(a) *R. v. Ion*, 2 Den. C. C. 475; 21 L. J. (M.C.) 166; 16 Jur. 746; 6 Cox, 1.

(b) *R. v. Aston*, 2 Russ. 732; v. also *R. v. Colclough* 10 L. R. Ir. 241; 15 Cox, 92.

(c) Extended to Treasury bills by 40 & 41 Vict. c. 2, s. 10, and to Metropolitan bills by 41 & 42 Vict. c. 37, s. 20.

(d) s. 9.

Making paper,
&c.

Making or having paper in imitation of that used for such bills, &c., or taking any impression from any plate, &c., mentioned in the last section, is a felony, punishable in the same way (a).

Purchasing,
&c., paper or
plates.

Purchasing, receiving, or having in possession, paper or plates made by authority for the purpose of such bills, &c., is a misdemeanor, punishable by imprisonment not exceeding three years (b).

Bank notes.

Relating to Bank Notes. — The following acts done without lawful authority or excuse, relating to bank notes, are felonies, punishable by penal servitude to the extent of fourteen years :—

Purchasing,
&c., forged
bank notes.

Purchasing, receiving, or having in possession, forged bank notes or bank bills, knowing the same to be forged (c).

Making paper.

Making or having moulds for making paper with the words “ Bank of England ” or “ Bank of Ireland ” visible on the surface, or with curved or waving bar lines, &c., or making, selling, &c., such paper (d).

Engraving.

Engraving on a plate, &c., any bank note, &c.; or using or having in possession any such plate; or uttering, or having paper upon which a blank bank note, &c., is printed (e).

Engraving on a plate, &c., any word or device resembling any part of a bank note, &c., or using or having such plate, &c.; or uttering or having paper on which there is an impression of any such words, &c. (f).

Making
moulds.

Making or having moulds for making paper with the name of any bankers appearing on the substance; making, selling, having, &c., such paper (g).

Foreign notes,
&c.

Engraving plates, &c., for foreign bills or notes;

(a) s. 10.

(b) s. 11; v. 29 & 30 Vict. c. 25, ss. 20, 21. What is criminal possession for the purposes of the Consolidation Act is defined in s. 45.

(c) s. 13.

(d) s. 14.

(e) s. 16.

(f) s. 17.

(g) s. 18.

using or having such plates ; or uttering paper on which any part of such bill, &c., may be printed (*a*).

There is another offence dealt with by the Forgery Act. With intent to defraud, to demand, obtain, or cause to be delivered to any person, or to endeavour so to do, any property by virtue of a forged instrument, knowing the same to be forged, is a felony, punishable by penal servitude to the extent of fourteen years (*b*).

Obtaining
property by
means of
forged instru-
ment.

False personation, the other main topic of the Forgery and False Personation Act, has already been treated of (*c*).

(*a*) s. 19. As to instruments for forging inland revenue stamps, 54 & 55 Vict. c. 38, s. 13; local stamps, 32 & 33 Vict. c. 49, s. 8.

(*b*) s. 38.

(*c*) v. p. 243.

CHAPTER VI.

INJURIES TO PROPERTY.

ONE of the Criminal Consolidation Acts, 1861 (*a*), deals with Arson and Malicious Injuries to Property. Of these offences the present chapter will treat.

ARSON.

Arson.

Arson is the unlawful, wilful, and malicious setting fire to any building. The term does not strictly comprise cases of setting fire to other things, such as corn, ships, &c.; but it will be convenient to treat here of them also.

Buildings
enumerated.

The statute in different sections deals with setting fire to :—

Churches, chapels, and other places of divine worship (s. 1).

Dwelling-house, any person being therein (s. 2) (*b*).

House, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or farm, or any farm building, or any building or erection used in farming land, or in carrying on any trade or manufacture, with intent thereby to injure or defraud any person (s. 3).

Station, warehouse, or other building belonging to any

(*a*) 24 & 25 Vict. c. 97. When merely a section is quoted in this chapter it must be understood to refer to that statute.

(*b*) This section has been held to apply although the only person in the house was the prisoner himself. *R. v. Pardoe*, 17 Cox, 715.

railway, port, dock, or harbour, or any canal or other navigation (s. 4).

Public building, as described in the Act (s. 5).

All these cases of arson are felonious, punishable by penal servitude to the extent of life. Arson in the case of any other building is punishable by penal servitude to the extent of fourteen years (*a*).

If a man, by wilfully setting fire to his own house, burn also the house of his neighbour, it is felony (*b*) ; or, if intending to set fire to the house of one person, he accidentally set fire to that of another (*c*). But if one, for the purpose of stealing rum, enter the part of a vessel where spirits are kept, and while tapping a cask a match held by him comes in contact with the spirits and causes a conflagration, which destroys the vessel, this is not arson (*d*).

Besides the above enactments with regard to setting fire to buildings, there are others dealing with the burning of other kinds of property.

Setting fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony, is a felony, punishable by penal servitude to the extent of fourteen years (*e*). But if a person maliciously, with intent to injure another by burning his goods, sets fire to such goods in his house, that does not amount to a felony under the Act, even though the house catches fire, unless the circumstances are such as to show that the person setting fire to the goods knew that by so doing he would probably cause the house also to take fire, and was reckless whether it did so or not (*f*). Attempting to set fire to a building,

Setting fire to anything in, &c., a building

(*a*) s. 6.

(*b*) *Probert's case* ; *Isaac's case*, 1 East, P. C. 1030, 1031.

(*c*) 1 Hale, 569.

(*d*) *R. v. Faulkner*, 11 Ir. R. Com. Law, 8 ; 13 Cox, 550.

(*e*) s. 7.

(*f*) *R. v. Nattrass*, 15 Cox, 73 ; v. also *R. v. Harris*, 15 Cox, 75.

or to any matter or thing mentioned above under such circumstances that, if the same were set fire to, the offender would be guilty of felony, is punishable in the same way (*a*).

Crops.

Corn, &c.—Setting fire to any *crop* of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, is a felony, punishable by penal servitude to the extent of fourteen years (*b*).

Stacks.

Setting fire to any *stack* of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, is a felony, punishable by penal servitude to the extent of life (*c*).

Attempt to set fire to crops or stacks.

Attempting to set fire to anything mentioned in the last two sections under such circumstances that, if the same were set fire to, the offender would be guilty of felony under either of those sections, is a felony punishable by penal servitude to the extent of seven years (*d*).

Mines.

Mines.—Setting fire to any mine of cannel coal, anthracite, or other mineral fuel, is a felony, punishable by penal servitude to the extent of life (*e*). Attempting to do the same under such circumstances, &c.; (v. above), is a felony, punishable by penal servitude to the extent of fourteen years (*f*).

Ships, setting fire to, &c.

We may notice here certain provisions as to destroying *ships* :—

Setting fire to, casting away, or in anywise destroying, any ship or vessel, whether the same be complete or

(*a*) s. 8.
(*d*) s. 18.

(*b*) s. 16.
(*e*) s. 26.

(*c*) s. 17.
(*f*) s. 27.

in an unfinished state, is a felony, punishable by penal servitude to the extent of life (*a*).

An attempt by any overt act to commit any such deed, under such circumstances that it would be a felony if actually committed, is a felony, punishable by penal servitude to the extent of fourteen years (*b*).

Attempt to set fire to, &c., ships.

It appears to still remain a felony, punishable with death, to set fire to any of Her Majesty's *ships of war*, or military or naval stores (*c*); or works, or vessels in the docks of the port of London (*d*).

Cases of setting fire still punishable with death.

In viewing the crime of arson generally we may notice

i. The act must be done unlawfully and maliciously. —Therefore no mere negligence or mischance will amount thereto. But it is not necessary that the offence should be committed from malice conceived against the owner of the property (*e*). For example, if the accused, intending to set fire to the house of A., accidentally sets fire to the house of B., it is equally arson (*f*). Nor is it necessary that he should have had any intention of setting fire to any one's house; he would be guilty of arson, if, intending to commit some felony of an entirely different nature, he accidentally set fire to another's house, provided he acted recklessly and the act he was committing was one which might probably cause a fire (*g*). So, also, will he be guilty, if, by wilfully setting fire to his own house, he burns that of his neighbour. If the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved (*h*). "Malice," said Mr. Justice Bayley, in the case referred to, "in common acceptation,

The setting fire, the intention.

(*a*) ss. 42, 43.

(*b*) s. 44.

(*c*) 12 Geo. 3, c. 24, s. 1.

(*d*) 39 Geo. 3, c. 69, s. 104 (local Act). See also Naval Discipline Act, 29 & 30 Vict. c. 109, s. 34.

(*e*) s. 58. This section applies to all offences coming within the Arson and Malicious Injuries Act.

(*f*) 1 Hale, 569.

(*g*) *R. v. Faulkner*, 11 Ir. Rep. Com. Law, 8; 13 Cox, 550.

(*h*) *Bromage v. Prosser*, 4 B. & C. 247; 6 D. & R. 291; 1 C. & P. 475.

means ill will against a person ; but in its legal sense, it means a wrongful act, done intentionally and without just cause or excuse."

The physical effects.

As to the "setting fire," from a *physical* point of view there must be an actual burning of some part, however trifling, of the house, &c. To support an indictment for setting fire to a house, it will not suffice merely to prove that something in the house was burnt (*a*).

The intent to injure or defraud.

ii. *The intent to injure or defraud.*—When it is necessary to allege this, there is no need to allege an intent to injure or defraud any particular person (*b*).

When a person wilfully sets fire to the house of another, the intent to injure that person is inferred from the act. But if the setting fire is the result of accident, though the accused be engaged in the commission of some other felony, there can be no intent to defraud. It will be remembered that a fraudulent intent is a necessary ingredient of an offence against s. 3 of the Act (*c*).

It is specially declared in the Act that its provisions apply to every person who, with intent to injure or defraud any other person, does any of the acts made penal, although the offender be in possession of the property in respect of which such act is done (*d*).

MALICIOUS INJURY.

Malicious injury,

Having noticed one of the most dangerous forms of malicious injury—arson, it remains to consider others, which are dealt with in the same Act (*e*). It will be remembered that here "malicious" is to be taken in its technical signification. To bring them within the pale

(*a*) But in such a case the circumstances may be such as to fall under s. 7 as if the prisoner intended that the house should also catch fire or was reckless whether it did so or not. v. *R. v. Child*, L. R. 1 C. C. R. 307 ; 40 L. J. (M.C.) 127 ; 24 L. T. (N.S.) 556 ; 19 W. R. 726 ; Warb. L. C. 207.

(*b*) s. 60. This section also applies to the Act generally.

(*c*) v. p. 266.

(*d*) s. 59.

(*e*) 24 & 25 Vict. c. 97.

of the criminal law, all the acts which we shall notice must be done maliciously and wilfully.

It will be well to classify the different kinds of malicious injury, and then to consider certain points which are common to them all.

Houses, &c.—To destroy or damage a dwelling-house by the explosion of gunpowder or other explosive substance, any person being therein, or in the same way to destroy or damage any building whereby the life of some person is endangered, is a felony, punishable by penal servitude to the extent of life (a). To place or throw gunpowder, &c., in, into, upon, under, against, or near any building, with intent to destroy the same or any machinery or goods, is a felony, punishable by penal servitude to the extent of fourteen years (b). to houses, by explosive substance, endangering life;

It is provided by another statute that any person unlawfully and maliciously causing, by any explosive substance, any explosion likely to endanger life or cause serious injury to property, is guilty of felony, and liable to penal servitude for life, and this whether any injury to person or property is actually caused or not (c). Attempting to cause any such explosion, and making or having in one's possession any explosive with intent to cause such an explosion, is punishable by twenty years' penal servitude. Making or having explosives in one's possession under such circumstances as to cause a reasonable suspicion that they are to be used for an unlawful object is a felony, punishable by penal servitude for fourteen years, unless the accused can show that his object was a lawful one (d).

To riotously and with force demolish, or begin to demolish, buildings, machinery, mine bridges, ways, &c., is a felony, punishable by penal servitude to the extent of life (e). If the offenders do not proceed further than to buildings, by demolishing, &c.;

(a) s. 9.

(b) s. 10.

(c) 46 & 47 Vict. c. 3, s. 2.

(d) *Ibid.* ss. 3 and 4.

(e) 24 & 25 Vict. c. 97, s. 11.

to injure or damage the above, they are guilty of a misdemeanor, punishable by penal servitude to the extent of seven years (a). If indicted under the former section the defendants may be found guilty of the offence set out in the latter. If the injury done be in the *bonâ fide* assertion of an alleged claim of right the offenders do not fall within this provision of the statute (b).

to buildings
by tenants;

For a tenant holding a dwelling-house or other building for any term, or at will, or after the termination of any tenancy, to unlawfully demolish or begin to demolish the building of which he is tenant, or to sever any fixture, is a misdemeanor, punishable by fine or imprisonment, or both (c).

to manufac-
tures and
machinery;

Manufactures and Machinery (d). — (a) To break, destroy, or damage with intent to destroy, or render useless, certain goods, viz., silk, woollen, linen, cotton, hair, mohair, or alpaca, in process of manufacture or the machinery employed in the manufacture; or (b) by force to enter any place in order to commit such offence, is a felony, punishable by penal servitude to the extent of life (e). In the case of machines used in agricultural operations, or in the manufacture of goods other than those mentioned above, the extent of the penal servitude is seven years (f).

mines;

Mines (g). — (a) To cause water to be conveyed into a mine with intent to destroy or damage the mine, or hinder the working; or (b) with like intent to obstruct an air-way, water-way, shafts, &c., is a felony, punishable by penal servitude to the extent of seven years (h).

Subject to the same punishment is the offence of destroying, damaging with intent to destroy, or obstruct the engines, erections, ways, ropes, &c., used in mines (i).

(a) s. 12.

(b) *R. v. Phillips*, 2 Mood. C. C. 252; v. also p. 278 post. (c) s. 13.

(d) See also ss. 11 and 12, which however, only apply to damage by riotous assemblies. (e) s. 14. (f) s. 15.

(g) See also ss. 11 and 12.

(h) s. 28.

(i) s. 29.

Regulations for the proper use of gunpowder and other explosives, when used in coal and metalliferous mines, are contained in the Acts 50 & 51 Vict. c. 58, and 35 & 36 Vict. c. 77.

Vessels (a).—To place or throw in, against, or near a vessels; ship or vessel, any gunpowder or other explosive substance with intent to destroy the vessel, machinery, working tools, goods, or chattels, although the explosion does not take place and no injury is effected, is a felony, punishable by penal servitude to the extent of fourteen years (b). To damage, otherwise than by fire, gunpowder, or other explosive substance, any vessel, complete or unfinished, with intent to destroy the same, or render it useless, is a felony, punishable by penal servitude to the extent of seven years (c).

To mask, alter, or remove any light or signal, or to exhibit any false sign or signal, with intent to bring a vessel into danger; or (b) to do anything tending to its immediate loss or destruction, is a felony, punishable by penal servitude to the extent of life (d). For cutting away or otherwise interfering with any buoy, mark, &c., used or intended for the guidance of seamen or the purpose of navigation, the extent of the penal servitude is seven years (e).

To destroy any part of a vessel in distress, wrecked, stranded or cast on shore, or any article belonging to such ship, is a felony, punishable by penal servitude to the extent of fourteen years (f).

Sea and River Banks, &c.—To break down, or otherwise damage banks, dams, walls, &c., so that the land or buildings are, or are in danger of being, overflowed; or (b) to destroy any quay, wharf, jetty, lock, sluice, weir, towing-path, drain, or other work belonging to any port, harbour, dock, reservoir, navigable river, or canal, is a felony, punishable by penal servitude to the extent of

(a) See also ss. 42-44, p. 268.

(d) s. 47.

(e) s. 48.

(b) s. 45.

(c) s. 46.

(f) s. 49.

life (a). To remove, &c., piles, &c., used for securing such banks, &c. ; or (b) to open flood-gates or sluices, or do any other injury to a navigable river or canal, with intent and effect to obstruct the navigation is a felony, the extent of the penal servitude for which is seven years (b).

to bridges,
viaducts, and
aqueducts ;

Bridges, Viaducts, and Aqueducts.—To destroy any bridge, viaduct, or aqueduct, over or under which any highway, railway, or canal passes ; or (b) to do anything so as to render either the bridge, &c., or the railway, &c., dangerous or impassable, is a felony, punishable by penal servitude to the extent of life (c).

to turnpikes ;

Turnpikes.—To destroy the gates, toll-bars, chains, or houses thereof, is a misdemeanor, punishable by fine or imprisonment, or both (d).

to walls, gates,
&c. ;

It may be noticed here, that to destroy any fences, walls, stiles, or gates, is punishable on summary conviction by a fine of £5 (over and above the damage done), and upon a second offence, with imprisonment with hard labour for twelve months (e).

to railway
trains ;

Railway Trains and Telegraphs. — To put or throw anything upon or across any railway, or to displace any rail, sleeper, &c. ; or (b) to interfere with the points or signals ; or (c) to do anything with intent to obstruct, upset, or injure any engine, tender, carriage, or truck using the railway, is a felony punishable by penal servitude to the extent of life (f). If any of these offences have been committed by a young person, he may be dealt with summarily, and punished by fine or imprisonment for three months ; and in the case of a male under fourteen years of age, with whipping (g).

By any unlawful act, or wilful omission or neglect, to obstruct any engine or carriage using the railway, is a misdemeanor, punishable by imprisonment not exceeding

(a) s. 30.

(b) s. 31.

(c) s. 33.

(d) s. 34.

(e) s. 25.

(f) s. 35.

(g) 42 & 43 Vict. c. 49, s. 11.

two years (*a*). The obstruction need not be by anything placed upon the railway. An alteration of the signals (*b*), or holding up the arms in the mode used by railway servants (*c*), is sufficient to bring the case within the Act.

To injure anything used in or about the telegraph, to telegraphs; or in the working thereof; or (*b*) to obstruct the sending or delivery of any message by such telegraph, is a misdemeanor, punishable by imprisonment not exceeding two years. But the magistrates, instead of sending the case for trial, may summarily dispose of it, awarding imprisonment not exceeding three months or fine (*d*). To attempt by any overt act any of the offences included in the last section, is also visited with the same punishment on summary conviction (*e*).

To unlawfully and maliciously cut or injure any electric line or work, with intent to cut off any supply of electricity, is a felony punishable by penal servitude to the extent of five years, or imprisonment with hard labour for not more than two years (*f*). to electric lines;

Ponds and Fish.—To destroy the dam, flood-gate, or sluice of a fish-pond, or private water with intent to take or destroy, or so as to cause loss or destruction of any of the fish; or (*b*) to put in such pond or water, lime, or other noxious material, with intent to destroy the fish; or (*c*) to destroy the dam or flood-gate of any mill-pond, reservoir, or pool, is a misdemeanor, punishable by penal servitude not exceeding seven years (*g*). to ponds and fish;

Animals.—To kill, maim, or wound any cattle is a felony, punishable by penal servitude not exceeding fourteen years (*h*). to cattle;

(*a*) 24 & 25 Vict. c. 97, s. 36. As to similar offences, v. also p. 183.

(*b*) *R. v. Hadfield*, L. R. 1 C. C. R. 253, 39 L. J. (M.C.) 131; 22 L. T. 664; 18 W. R. 955; Warb. L. C. 86.

(*c*) *R. v. Hardy*, L. R. 1 C. C. R. 278.

(*d*) s. 37.

(*e*) s. 38.

(*f*) 45 & 46 Vict. c. 56, s. 22.

(*g*) s. 32; v. 36 & 37 Vict. c. 71, s. 13, as to salmon rivers.

(*h*) s. 40.

to other
animals;

To kill, maim or wound any dog, bird, or beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, is punishable, on summary conviction, for the first offence, by imprisonment not exceeding six months, or penalty not exceeding £20 above the injury; for the second offence, imprisonment not exceeding twelve months (*a*).

Cruelty to
animals.

To cruelly beat, ill-treat, over-drive, abuse or torture a *domestic animal* of any kind, is punishable by a penalty not exceeding £5, or imprisonment for three months (*b*). To convey any such animal in any vehicle, in such a manner as to subject it to unnecessary pain is punishable, for the first offence, by a penalty not exceeding £3; and for the second and every subsequent offence by a penalty not exceeding £5 (*c*). To employ a dog to draw a cart or barrow is punishable by a fine of £2 for the first and £5 for a subsequent offence (*d*).

Injury to trees,
&c.;

Trees, Plants, &c.—To destroy or damage any tree, sapling, shrub, or underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining, or belonging to, any dwelling-house, provided that the amount of the injury done exceeds the sum of £1, or if the tree, &c., is growing elsewhere, provided that the amount exceeds £5, is a felony, punishable by penal servitude to the extent of three years (*e*). If the injury amounts to the value of one shilling at the least, wheresoever the tree, &c., is growing, the offence is punishable, on summary conviction, by imprisonment not exceeding three months, or fine not exceeding £5 above the amount of the injury; for the second offence, imprisonment not exceeding twelve months; the third offence is a misdemeanor, punishable by imprisonment not exceeding two years (*f*).

(*a*) s. 41.

(*b*) 12 & 13 Vict. c. 92, ss. 2 and 18.

(*c*) *Ibid.* s. 12; v. also 57 & 58 Vict. c. 57, s. 23. As to vivisection, v. 39 & 40 Vict. c. 77.

(*d*) 17 & 18 Vict. c. 60, s. 2.

(*e*) 24 & 25 Vict. c. 97, ss. 20 & 21.

(*f*) s. 22.

To destroy, or damage with intent to destroy, any to plants, &c.; plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, is punishable, on summary conviction, by imprisonment not exceeding six months, or penalty not exceeding £20 above the amount of the injury; the second offence is a felony, punishable by penal servitude to the extent of three years (*a*). If the plant, &c., was not growing in any such place, the offence is punishable, on summary conviction, by imprisonment to the extent of a month, or fine of twenty shillings; for the second offence, imprisonment not exceeding six months (*b*).

To cut, or otherwise destroy, any hopbinds growing on to hopbinds; poles in any plantation of hops, is a felony, punishable by penal servitude to the extent of fourteen years (*c*).

Works of art, &c.—To destroy or damage books, works to works of art. of art, &c., in public museums, &c.; or (b) pictures, statues, monuments belonging to places of worship or public bodies, or in public places, is a misdemeanor, punishable by imprisonment not exceeding six months (*d*).

Such are the particular cases provided for by the General statute; but in addition to these there are the following provisions. general provisions:—

Whosoever unlawfully and maliciously commits any damage to any real or personal property, either of a public or private nature, for which no punishment has been provided in the Act (the damage exceeding £5), is guilty of a misdemeanor, punishable by imprisonment not exceeding two years. If the offence is committed at night (*i.e.*, between the hours of nine in the evening and six in the morning), the offender is liable to penal servitude to the extent of five years (*e*).

It is necessary to show that in doing the damage the defendant acted maliciously, *i.e.*, intentionally, or, at least,

(*a*) s. 23.
(*d*) s. 39.

(*b*) s. 24.
(*e*) s. 51.

(*c*) s. 19.

that he acted recklessly with full knowledge that his conduct might result in damage being done. For instance, if in the course of a street fight the defendant threw a stone intending to hit an opponent and the stone broke a window, he ought not to be convicted of doing wilful damage unless the jury are satisfied that he threw the stone recklessly, knowing that it might break a window (a).

Claim of right. It is a defence to such a prosecution that the defendant acted as he did in the exercise of a supposed right, provided he did no more damage than he could reasonably suppose to be necessary for the assertion or protection of that right (b).

Where the injury does not exceed £5.

In cases where the damage does not exceed £5, any person wilfully or maliciously committing damage to any property may be summarily convicted before a magistrate, and punished by imprisonment not exceeding two months, or fine not exceeding £5, and also a further sum not exceeding £5 as compensation. But this section does not extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the thing complained of, nor to any trespass, not being wilful or malicious, committed in hunting, fishing, or in the pursuit of game (c).

Making or having any dangerous or noxious thing with intent, &c.

Making or knowingly having in possession any gunpowder, or any dangerous or noxious thing, or any instrument or thing, with intent, by means thereof, to commit any of the felonies mentioned in the Act, is a misdemeanor, punishable by imprisonment not exceeding two years (d).

The following rules apply to all offences dealt with in the Act :—

(a) *R. v. Pembliton*, L. R. 2 C. C. R. 119; 43 L. J. (M.C.) 91; 30 L. T. (N.S.) 408; 22 W. R. 553; 12 Cox, 607.

(b) *R. v. Clemens*, L. R. [1898] 1 Q. B. 556; 67 L. J. (Q. B.) 482; 78 L. T. 204; 46 W. R. 416.

(c) s. 52.

(d) s. 54.

It is not necessary to prove that the defendant was actuated by malice against the owner of the property (a). Particular malice need not be shown.

If a person, with intent to injure or defraud any other person, does any of the prohibited acts, it is no defence that he (the offender) was in possession of the property against, or in respect of which such act was done (b); as for example, if a tailor, or carrier wilfully and maliciously destroys goods intrusted to him. No defence that offender was in possession of the property.

When it is necessary to allege an intent to injure or defraud, it is not necessary to allege in the indictment, or prove at the trial, an intent to injure or defraud any particular person; proof of a general intent to injure or defraud will suffice (c). Proof of general intent to defraud, &c., will suffice.

(a) s. 58.

(b) s. 59.

(c) s. 60.

BOOK III.

Criminal
procedure.

HAVING considered the essentials of crime in general, and examined the character of particular crimes, a second portion of the matter with which the Criminal Law is concerned now presents itself to our notice, namely, the *proceedings* which have for their object the conviction of the guilty and the discharge of the innocent. But before entering upon the subject of Criminal Procedure, it will be well to inquire what measures the law has adopted in order to render those proceedings as far as possible unnecessary; in other words, to treat of the Prevention of Offences.

CHAPTER I.

PREVENTION OF OFFENCES.

Two classes of
measures for
the prevention
of offences.

UNDER this head fall two classes of measures, differing considerably in their nature. The first is applicable chiefly in the case of those who have to some extent erred, but whom it is not deemed advisable to visit with punishment in the strict sense of the term. The second consists of general measures and provisions for the prevention of the commission or repetition of offences.

Finding
securities.

A. The first mode of preventing offences may be generally said to consist in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to give security that the offences which are apprehended shall not happen. This is effected by their finding pledges or securities, which are of two kinds:—

i. For Keeping the Peace. ii. For Good Behaviour. But, in the first place, we shall go over the ground which is common to both.

Of what does this “given security” consist? The person of whose conduct the law is apprehensive is bound, with or without one or more sureties, in a recognizance or obligation to the Crown. This is taken by some court or by some judicial officer. The recognizance is of the nature following:—The person bound acknowledges himself to be indebted to the Crown in the sum specially ordered, with a condition that the recognizance shall be void if he appear in court on a day named, and in the meantime *keep the peace* either generally towards the sovereign and his people, or particularly also with regard to the person who seeks the security. Or, as is more usual, the recognizance may be to keep the peace for a certain period, an appearance in court not being required. If it be for good behaviour—then on condition that he demean and behave himself well, either generally or specially, for the time therein limited. If the condition of the recognizance is broken, in the one case by any breach of the peace, in the other by any misbehaviour, the recognizance becomes forfeited or absolute. It is then *estreated*, or extracted from the other records, and sent up to the Exchequer; the party and his sureties becoming the Crown’s absolute debtors for the sums in which they are respectively bound (a). The recognizance.
Forfeiture.

By whom may these securities be demanded? By any justice of the peace, and also by certain others who are regarded as conservators of the peace; for example, the judges of the Queen’s Bench Division, the coroner, sheriff, &c. They may demand the security at their own discretion, or at the request of a subject upon his showing due cause. If the magistrate is unwilling to grant it, it may be obtained by a mandatory writ, called a *supplicavit*, which will compel him to act as a ministerial and not as Who may demand securities.

(a) 4 Bl. 253; C. O. rules 1886, 123–127.

a judicial officer. But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizance there, as they are empowered to do by statute (a).

Who may be bound.

Any person under the degree of nobility may be bound over either by a justice or at the quarter sessions. Wives may demand security against their husbands, and *vice versa*. Infants may demand security, and may be compelled to find security by their next friend.

The following is the method of procedure :—

Procedure.

The person requiring security goes before a justice, and makes his complaint, which is usually, though not necessarily, in writing. If the person complained of is present, he may be required at once to enter into the required recognizance; but if not present, the magistrate issues a summons, as in other cases to which the Summary Jurisdiction Acts apply. When he comes before the magistrate, he must, if the magistrate so order, offer a recognizance and sureties to keep the peace, or to be of good behaviour towards the complainant, or else he may be committed to prison for a term not exceeding six months, if the court be so constituted as to be a petty sessional court, and if not, for a term not exceeding fourteen days (b). The number and the sufficiency of the sureties, the largeness of the sum for which security is to be given, and the time for which the party shall be bound, are in the discretion of the magistrates. The person against whom the application is made may give evidence on his own behalf.

So far the two kinds of security are on the same footing. They must now be considered separately.

Security for keeping the peace—generally ;

i. *For the Peace*.—This may be granted (a) *generally on public grounds*. Any justice may demand securities from

(a) v. 21 Jac. 1, c. 8.

(b) 42 & 43 Vict. c. 49, s. 25. As to what constitutes a Petty Sessional Court, v. p. 477.

the following : those who in his presence make an affray, or threaten to kill or beat one another ; or who contend together with hot and angry words ; or go about with unusual weapons or attendants to the terror of the people ; also common barrators (a) ; persons who have committed a breach of the peace in the presence of the constable who has brought them before the justice, and those who, having been bound to the peace, have forfeited their recognizance by breaking it (b). (b) *Specially*, by demand ^{specially} of a *private person* ("swearing the peace" against another). This security may be demanded by a person when he fears that another will kill him, his wife or child, or do him other corporal injury ; or will burn his house ; or will procure others so to do. The fear must arise from a threat, though that threat need not be expressed in words. The magistrate is required to grant the security if the applicant swears that he is in fear of death or bodily harm, and shows that there is ground for his fear ; and swears that he is not acting out of malice or for mere vexation (c).

ii. *For good Behaviour or Abearance*.—This includes a ^{Security for good behaviour.} surety for keeping the peace and something more. A magistrate may bind over to good behaviour all those *that be not of good fame*. This general term includes not only those who act *contra pacem*, but also those who act *contra bonos mores*. It will comprise the following, among others (d) :—Rioters ; barrators ; those maintaining or constantly resorting to barrators ; suspected persons who cannot give good account of themselves ; those who are likely to commit any crime ; drunkards ; cheats ; vagabonds, &c.

A recognizance to keep the peace, or to be of good ^{Forfeiture.} behaviour, or not to commit some particular act, may be declared by the court before whom it was entered into to be forfeited, upon proof of the conviction of the person

(a) v. p. 83.
(c) 4 Bl. 255.

(b) 4 Bl. 254.
(d) For other cases, v. Burn, 759.

bound as principal of any offence which is in law a breach of the condition of the recognizance (*a*).

Security either where a crime has, or has not been committed.

Criminal Consolidation Acts.

Security for good behaviour may be required in two classes of cases : (*a*) where no actual crime has been committed ; (*b*) where the party of whom security is taken has been convicted of some crime. In the latter case, if punishment is awarded, the court of summary jurisdiction may order the offender, at the expiration of his term of punishment, or, if the punishment consists of a fine, at once, to enter into a recognizance to keep the peace, or for good behaviour. Or again, instead of awarding any punishment, the court may order the defendant to enter into such recognizance. In certain cases where the defendant has been convicted of an indictable offence, namely, of any indictable offence punishable under one of the Criminal Consolidation Acts, 1861, he may be required to enter into his own recognizances and find sureties. In each of these Acts there is inserted a clause to the following effect :—On conviction of an indictable *misdemeanor* punishable under one of those Acts, the court may, if it think fit, in addition to or in lieu of any of the punishments authorised in the Act, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour. And in case of any *felony* punishable under one of those Acts, the court may require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment authorised by the Act. But no person is to be imprisoned under this clause, for not finding sureties, for any period exceeding one year (*b*).

General measures for prevention of crime.

B. We have now to consider certain general measures for the prevention of the commission of crimes, or their repetition. Provisions having this object in view are

(*a*) 42 & 43 Vict. c. 49 (Summary Jurisdiction Act, 1879), s. 9.

(*b*) 24 & 25 Vict. c. 96, s. 117 ; c. 97, s. 73 ; c. 98, s. 51 ; c. 99, s. 38 ; c. 100, s. 71.

contained in an Act for the more effectual Prevention of Crime (*a*). This statute deals with a variety of matters (the design of which principally is to prevent the repetition of crime), which may be thus classified:—

i. As to *holders of licences* under the Penal Servitude Acts.—If, on their being brought by a constable before a court of summary jurisdiction, it appears that they are getting their living by dishonest means, their licences are forfeited. They are also punished on the breach of certain conditions. They are required to notify their residence to the police within forty-eight hours of their arrival in any place (*b*). Holders of licences.

ii. *Identification* of persons who have been convicted. Identification of offenders.
—Due provision is made for keeping a register of prisoners and making returns to the Home Secretary in England, the Lord Lieutenant in Ireland. The same authorities may make regulations for photographing prisoners (*c*).

iii. Persons who have been *twice convicted* of crime Offences by those who have been twice convicted.
may be punished in certain cases, within seven years from the last conviction, by imprisonment not exceeding one year, *e.g.*, when it appears to the court of summary jurisdiction before whom they may be brought that there are reasonable grounds for believing that they are getting their livelihood by dishonest means; or that they refuse to give their names and addresses, or give false ones, when asked by such court; or that they are found in any place public or private, under such circumstances as to satisfy such court that they are about to commit or aid in the commission of any offence punishable on indictment or summary conviction; or that they are found in or on any dwelling-house, building, yard, or premises being part of such dwelling-house, or any shop, warehouse, counting-house, or other place of

(*a*) 34 & 35 Vict. c. 112.

(*b*) *Ibid.* ss. 3-5; 54 & 55 Vict. c. 69, s. 4; v. p. 462.

(*c*) 34 & 35 Vict. c. 112, s. 6.

business, or any garden, orchard, pleasure ground, nursery ground, &c., without being able to give a satisfactory account of themselves (*a*). They may also be subjected to police supervision for seven years or less (*b*).

Acts conduc-
ing to crime.

iv. Penalties are prescribed for harbouring thieves, assaulting the police, purchasing less than specified quantities of old metal, &c. (*c*).

Search for
stolen
property.

v. Power is given to constables authorised by a chief officer of the police to enter houses, &c., *to search* for stolen property in premises which, within the last twelve months, have been in the occupation of persons who have been convicted of receiving stolen property, or harbouring thieves; or are in occupation of persons who have been convicted of offences involving fraud or dishonesty, and punishable by penal servitude or imprisonment (*d*).

Evidence on
trial for
receiving.

vi. At a trial for receiving stolen goods certain evidence, not usually allowed, may be given (*e*).

(*a*) 34 & 35 Vict. c. 112, s. 7; 54 & 55 Vict. c. 69, s. 6.

(*b*) 34 & 35 Vict. c. 112, s. 8.

(*c*) *Ibid.* ss. 10-13.

(*d*) *Ibid.* s. 16.

(*e*) *Ibid.* s. 19. v. p. 221.

CHAPTER II.

COURTS OF A CRIMINAL JURISDICTION.

IN this chapter we shall treat of courts taking cognisance of indictable crimes, reserving for a subsequent chapter the consideration of courts of a summary jurisdiction (a). These courts are either of *general*, or of *local* and *special* jurisdiction. We are concerned chiefly with the former, and to them we now turn, and notice the several tribunals as far as possible in the order of their dignity.

Courts dealing with indictable crimes.

THE HIGH COURT OF PARLIAMENT.

This assembly proceeds to the punishment of offenders either in a *legislative* or a *judicial* capacity.

Court of Parliament

When acting in the former of these capacities it cannot strictly be termed a court. It does not then sit to execute existing laws, but to make new ones. The occasions when its legislative functions are exercised to punish offenders are when *bills of attainder* or *bills of pains and penalties* are passed to punish particular persons for treason or felony, beyond and contrary to the common law, to serve a special and what has generally been an oppressive purpose. They pass through the same stages as any other bill, though usually commencing with the Lords.

Bills of attainder or of pains and penalties.

When sitting in a *judicial* capacity the jurisdiction of this, the highest court of the kingdom, is exercised in one of two modes:—

(a) v. p. 473. As to Court for Crown Cases Reserved, v. p. 467.

i. *Impeachment*.ii. *Indictment*.

Impeachment.

i. *Impeachment* before the Lords by the Commons.—The Commons act as prosecutors, the allegation being that it is the people, whom they are supposed to represent, who are injured; the Lords form the tribunal. In place of an ordinary bill of indictment the charge against the offender is contained in articles of impeachment, which are prepared by a committee of the House of Commons. A peer may be impeached for any crime; a commoner may be impeached, at any rate for a misdemeanor, and, according to high authority, for any crime (*a*).

Pardon cannot
be pleaded to
impeachment.

It should be remembered that it was provided by the Act of Settlement that no pardon under the Great Seal is pleadable to an impeachment by the Commons in Parliament. That is, the proceedings cannot be suppressed by the sovereign intervening with a pardon; though, when the matter has been inquired into, and judgment given, he may then exercise his royal prerogative of pardon. It does not seem necessary to detail the various proceedings upon an impeachment, as there has been no instance where such a course has been taken for nearly a century (*b*).

Indictment.

ii. *Indictment* before the House of Peers.—In this court are tried peers and peeresses against whom an indictment for *treason* or *felony*, or for misprision of either (*c*), is found during a session of Parliament. The indictment, that is, a true bill, is found in the ordinary way by a grand jury in the Queen's Bench Division, or at the assizes; the indictment being removed to the House of Peers by writ of *certiorari* (*d*). The peer may plead a pardon before the Queen's Bench Division, so as to avoid the trouble of appointing a high steward, &c.,

(*a*) May, 625, 626. But see Lord Campbell's *Lives of the Chancellors*, vol. iii. p. 357.

(*b*) Full details will be found in May, 626, *et seq.*

(*c*) Peers are tried for *misdemeanors* before the ordinary tribunals.

(*d*) v. p. 356.

merely to receive that plea ; but no other plea, as “ guilty ” or “ not guilty,” can be pleaded in the inferior court. But every peer against whom any indictment for felony may be found, must plead thereto in the court in which he is tried, and is liable to the same punishment as any other subject, upon conviction for felony, any law or usage to the contrary in any wise notwithstanding (*a*).

The court is presided over by a Lord High Steward, ^{The trial.} appointed by commission under the great seal. He is not a judge, but chairman, and votes with the other peers. The privilege of being tried by this court, which, however, can probably be waived, depends upon nobility of blood, rather than upon the right to a seat in the House, as will appear from the considerations following. This kind of trial may be claimed by a peer under age ; by Scotch and Irish peers, though they be not representative ; by females—namely, peeresses by birth, and those by marriage unless when dowagers they have disparaged themselves by taking a commoner for a second husband (*b*). Bishops, however, are not tried in this court, but in courts which have jurisdiction over commoners. As to the right of bishops to take part in the trials in the House of Peers, a resolution of the House in Danby’s case has ever since been adhered to, “ that the lords spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty ” (*c*). They then retire voluntarily, but not without entering a protest declaring their right to stay.

COURT OF THE LORD HIGH STEWARD OF GREAT BRITAIN.

The trial by the House of Peers, as we have seen, can only be held during the sitting of Parliament. During a recess this court takes its place for the trial of similar offences. ^{Court of Lord High Steward.}

(*a*) 4 & 5 Vict. c. 22.

(*b*) 4 Bl. 265.

(*c*) Lords’ Journal, May 15th, 1679.

The trial.

Here, unlike the former tribunal, the Lord Steward is not merely chairman of the court, giving his vote with the rest. He is judge of matters of law, as the Lords triers are of matters of fact. Therefore, as a judge, he has no right to vote. A commission under the Great Seal confers the office of Lord High Steward for the particular occasion on some member of the House of Lords. When the indictment has been found, and removed by writ of *certiorari*, the Steward directs a precept to the serjeant-at-arms to summon the Lords to attend the trial. In cases of treason, or misprision thereof, there must be summoned all the peers who have a right to sit and vote in Parliament (*a*). The decision is by the majority, which must consist of twelve at the least. Bishops cannot be summoned to this court, nor have they the right of being tried there. But they have the right to stay and sit in such court in capital cases (*b*).

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE.

Queen's Bench Division.

This court has jurisdiction both in criminal and in civil cases. On the Crown side it takes cognisance of criminal causes from high treason down to the most trivial misdemeanor or breach of the peace. But its criminal jurisdiction is rarely exercised, unless the circumstances of the case are of an extraordinary character, and demand a special investigation.

Original jurisdiction.

Its *original* jurisdiction includes all offences committed in Middlesex, which may be prosecuted in this court by indictment; and misdemeanors committed in any county of England may be prosecuted herein by information filed by the Attorney-General *ex officio*, or at the instance of a private individual prosecuting in the Crown Office by leave of the court. But the former jurisdiction is very rarely exercised; crimes committed in Middlesex being

(a) 7 & 8 Wm. 3, c. 3, s. 11.

(b) *v. supra*.

tried at the Central Criminal Court or at the Quarter Sessions. The grand jury are summoned only when the Master of the Crown Office has received due notice of some business to be brought before the court (a).

Its *transferred* jurisdiction is much more extensive. To it indictments and proceedings from all inferior courts may be removed by writ of *certiorari*; but (unless it be an indictment against a body corporate not authorised to appear by attorney in the court in which the indictment is preferred, or unless it be at the instance of the Attorney-General acting on behalf of the Crown) only under one of the following circumstances: that it has been made clear by the party applying for the writ to the court from which the writ is to issue (*i.e.*, the Queen's Bench), (a) that a fair and impartial trial cannot be had in the court below; or (b) that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or (c) that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same (b). And the same rules, still further to prevent the vexatious removal of indictments into the Queen's Bench, provide that no *certiorari* is to issue to remove an indictment unless recognizances be given for the payment of costs in case of failure by the party applying for the removal (c).

As to the mode of trial in this court. In cases of felony or treason the trial is *at bar*, that is, before the judges of the court sitting *in banc*. In misdemeanors the trial, if of sufficient importance, is at bar; otherwise at *nisi prius*. There are certain differences, according as the trial is in the one or the other way; but into these we need not enter. The Queen's Bench Division is empowered to order certain offenders to be tried at the Central Criminal Court, viz., persons charged with any

(a) 35 & 36 Vict. c. 52.

(b) Crown Office Rules, 1886, r. 29.

(c) Crown Office Rules, 1886, r. 30.

offence committed out of the jurisdiction of the latter court (*a*), but not indictments or inquisitions against peers (*b*).

Inferior courts superseded by the Queen's Bench.

On account of the dignity of the Queen's Bench Division, as the highest court of criminal jurisdiction over ordinary offenders, if that court comes into any county (*c*), all former commissions of oyer and terminer and general gaol delivery are at once *ipso facto* absorbed and determined. But this does not apply to the Central Criminal Court, which is held without regard to whether the Queen's Bench Division is sitting or not (*d*); nor does it apply to the Middlesex Sessions (*e*).

The tribunals hitherto noticed, as a rule, exercise their jurisdiction irrespective of place; those to which we now turn are general but local, that is, found all over the kingdom, but each attached to a particular district.

ASSIZES.

Assizes, where and when held.

The heading we have just prefixed to a description of this class of tribunals is the popular, but not the technical, designation of the courts of *Oyer and Terminer* and *General Gaol Delivery*, which are periodically held in every county in the kingdom. We may anticipate by noticing that for offences committed in London, Middlesex, and certain suburbs in Essex, Kent, and Surrey, the Central Criminal Court has been established; and that, though assizes have been abolished for the rest of Surrey, judges have been sent there in virtue of a special commission.

(*a*) 19 & 20 Vict. c. 16, ss. 1 & 3, commonly called Palmer's Act, from the name of the prisoner, whose trial it was deemed necessary to remove from Staffordshire on account of the strong prejudice prevailing against him there.

(*b*) *Ibid.* s. 29.

(*c*) As it was removed to Oxford on account of the plague of 1665.

(*d*) 25 Geo. 3, c. 18; 32 Geo. 3, c. 48.

(*e*) This court, however, is not in strictness a court of oyer and terminer Hal. Sum. 165.

The assizes were formerly held in each county twice in the year, namely, in the spring and summer, and in some places in the winter also. The Queen now has power by Order in Council to appoint the places at which Assizes are to be held, and to alter the arrangements of the existing circuits (*a*). The result of an Order in Council (*b*) under this provision is, that on all the circuits assizes are held for criminal business in the Winter, Summer, and Autumn; and there is also on the Northern and North-Eastern Circuits an Easter Assize.

For the purposes of the assizes the county is divided Circuits. into eight *circuits*, over each of which the judges travel, holding courts at all the county and other assize towns. In the spring and summer two judges are usually assigned to each circuit, except the Welsh circuits, to which only one is sent, the judges of the two Welsh circuits meeting and sitting together in the counties of Cheshire and Glamorgan. In the winter the arrangements are irregular. The circuits as at present constituted are the following:—

i. Northern (Westmoreland, Cumberland, and Lancaster).

ii. North-Eastern (Northumberland, Durham, and York).

iii. Midland (Lincoln, Derby, Nottingham, Warwick, Leicester, Northampton, Rutland, Buckingham, and Bedford).

iv. South-Eastern (Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, Surrey, and Sussex).

v. Oxford (Berkshire, Oxford, Worcester, Stafford, Salop, Hereford, Monmouth, and Gloucester).

(*a*) 38 & 39 Vict. c. 77, s. 23. See also 39 & 40 Vict. c. 57; 40 & 41 Vict. c. 46; and 42 Vict. c. 1.

(*b*) Order in Council of 28 July 1893.

vi. Western (Hants, Wilts, Dorset, Devon, Cornwall, and Somerset).

vii. North Wales and Chester (Montgomery, Merioneth, Carnarvon, Anglesey, Denbigh, Flint, and Chester).

viii. South Wales (Pembroke, Cardigan, Carmarthen, Brecknock, Radnor, and Glamorgan).

Commissions
under which
the judges sit.

It will be well to explain in virtue of what authority the judges preside at the assizes, as there is commonly a misconception in the matter. This authority is fourfold, consisting of the following commissions:—(a) Of *Oyer and Terminer*. This commission, empowering to try treasons, felonies, and misdemeanors, is directed to certain judges and others. But only the judges, serjeants-at-law, Queen's counsel, and barristers with patents of precedence, are of the quorum; so that the others cannot act without the presence of one of them. Under this commission persons may be tried whether in custody or on bail; but as the words of the commission are "to inquire, hear, and determine," they can only proceed upon an indictment found at the same assizes; for they must first inquire by means of the grand jury before they are empowered to hear and determine by the help of the petty jury. Therefore, a further commission is necessary (a). (b) Of *Gaol Delivery*, directed to the judges, serjeants, and Queen's counsel, the clerk of the assize and associate, empowering them to try every prisoner in the gaol committed for any offence whatever, so that the gaols may be cleared of those awaiting trial. (c) Of *Nisi Prius* (for the trial of civil causes). (d) Of the *Peace*, by which all justices are bound, under pain of fine upon notice to attend the judges and to assist them, if required, in such matters as lie within their knowledge and jurisdiction, for example, to return recognizances, &c. (b).

(a) v. 4 Bl. 270.

(b) v. 4 Bl. 270.

It will be noticed that the judges do not sit in virtue of their position as judges of the High Court of Justice; but as commissioners specially sent down.

When the state of business requires it, the judges are often assisted by Queen's counsel, so that sometimes as many as four or five commissioners are sitting at the same time (a). Commissioners.

In this way there is a general clearance of prisoners awaiting their trial at least three times a year. On urgent occasions, as of offences demanding immediate inquiry and punishment, the sovereign issues a *special* or *extraordinary* commission of oyer and terminer and gaol delivery for the special trial of such offences, and those only. The proceedings are generally the same as on ordinary commissions.

THE HIGH COURT OF ADMIRALTY.

The ancient court of the Lord High Admiral had jurisdiction for the trial of offences at sea or on board ships lying in the rivers below bridge (b). By the Act 28 Hen. 8, c. 15, the king was authorised to issue commissions under the great seal to the admiral and his deputies to try certain offences (c) committed at sea or within the jurisdiction of the admiral in the same way as if committed upon the land. In practice this jurisdiction was exercised by the judge of the Admiralty Court. Offences at sea, where tried.

Now the Central Criminal Court and the justices of assize and commissioners of *Oyer and Terminer* and *General Gaol Delivery* have the power to try all offences committed on the high seas or within the jurisdiction of the Admiralty, although the power still exists of Present practice.

(a) 36 & 37 Vict. c. 66, s. 37.

(b) 13 Rich. 2, c. 5; 15 Rich. 2, c. 3.

(c) Treasons, felonies, robberies, murders, and conspiracies; extended by 39 Geo. 3, c. 37, to all offences.

issuing a special commission under the Act of Hen. 8 (a).

Jurisdiction of Admiralty.

The jurisdiction of the Admiralty in the case of British ships and all persons on board them, extends not only over the high seas, but also in foreign rivers as far as great ships go; although the municipal authorities of the foreign country may have concurrent jurisdiction (b). In the case of foreign ships and persons other than British subjects, the jurisdiction extends over the territorial waters of Her Majesty's dominions, which include the high seas to a distance of one marine league from low-water mark (c). The jurisdiction of the Admiralty is also extended over offences committed in *any* place out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time of, or within three months before, the offence was employed in any British ship (d).

All indictable offences mentioned in the Criminal Law Consolidation Acts, 1861, if committed within the jurisdiction of the Admiralty, are subject to the same punishments, and may be tried in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner as if the offence had been committed in that county or place (e).

CENTRAL CRIMINAL COURT.

Central Criminal Court.

This court has generally the same criminal jurisdiction as the assizes. It was established in 1834 for the trial

(a) 4 & 5 Wm. 4, c. 36, s. 22; 7 & 8 Vict. c. 2. The courts in the colonies have also cognizance of offences committed within the Admiralty jurisdiction, 11 & 12 Wm. 3, c. 7; 46 Geo. 3, c. 54; 12 & 13 Vict. c. 96; 41 & 42 Vict. c. 73; 57 & 58 Vict. c. 60, s. 686.

(b) *R. v. Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M.C.) 12; 19 L. T. (N.S.) 400; 17 W. R. 208; 11 Cox, 198; *R. v. Carr*, L. R. 10 Q. B. D. 76; 52 L. J. (M.C.) 12; 47 L. T. (N.S.) 450; 31 W. R. 121; 15 Cox, 129; 47 J. P. 38.

(c) 41 & 42 Vict. c. 73.

(d) Merchant Shipping Act, 57 & 58 Vict. c. 60, s. 687.

(e) 24 & 25 Vict. c. 94, s. 9; c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68.

of treasons, felonies, and misdemeanors, committed within the city of London and county of Middlesex, and in certain specified parts of the counties of Essex, Kent, and Surrey ; such district for this purpose being regarded as one county (*a*). The judges sit under commissions of oyer and terminer and gaol delivery. The sessions of the court are required to be holden at least twelve times a year, and oftener if need be ; the particular dates being fixed each year at a meeting of the judges. This is a superior court, and mandamus will not lie to it (*b*).

The commissioners or judges of the court include the Lord Chancellor, the Judges of the High Court, the Lord Mayor, Aldermen, Recorder and Common Serjeant of London, and such others as the Crown from time to time may appoint. Usually at each session the Recorder and Common Serjeant sit on the first two days ; after which they are joined by one or two of the judges of the High Court, who try the more serious cases. The commissioners.

We have already seen (*c*) that offences committed within the jurisdiction of the Admiralty may be tried here ; also that certain cases may be sent by the Queen's Bench Division to this court (*d*). Here also by an order of that Division may be tried persons subject to the Mutiny Acts for the murder or manslaughter in England or Wales of any person subject to those Acts (*e*). Cases which may be sent to the Central Criminal Court.

The Central Criminal Court has also a transferred jurisdiction. Indictments found at the various sessions of the peace within the district of its jurisdiction may be removed to it by *certiorari* (*f*), and justices of the peace may deliver over indictments found at the sessions to this court, as to the judges on circuit (*g*). Its transferred jurisdiction.

(*a*) 4 & 5 Wm. 4, c. 36.

(*b*) *R. v. The Justices of the Central Criminal Court*, L. R. 11 Q. B. D. 479 ; 52 L. J. (M C.) 121.

(*c*) v. p. 295.

(*d*) v. p. 291.

(*e*) 25 & 26 Vict. c. 65. As to indictments under Corrupt Practices Acts, v. 46 & 47 Vict. c. 51, s. 50.

(*f*) 4 & 5 Wm. 4, c. 36, s. 16.

(*g*) *Ibid.* s. 19.

Sessions not
interfered
with.

The sitting of the Central Criminal Court does not interfere with the sessions of the peace held within the district, that is, the latter may be held notwithstanding that the former tribunal is sitting (*a*).

QUARTER SESSIONS.

Sessions.

These courts, which are held for the trial of criminals as well as for other objects, are of two kinds:—

i. The General (Quarter) Sessions of the Peace for the county.

ii. The Borough Sessions.

County quar-
ter sessions.

The General County Sessions must be held in every county once every quarter at stated times, in which case they are termed the general quarter sessions of the peace. And if, on account of the amount of business, it is necessary that courts of this description should be held intermediately, they are termed general sessions of the peace. The authority and jurisdiction of the court under either title is the same, except where the jurisdiction is given by statute expressly to the court of quarter sessions (*b*).

Time of
holding.

The dates fixed by statute for the holding of the county quarter sessions are the first weeks after each of the following days—October 11th, December 28th, March 31st, June 24th (*c*). But the justices may at any time, when it may appear desirable for the purpose of not interfering with the ensuing assizes, alter the date of holding the quarter sessions to some time not earlier than fourteen days before, nor later than fourteen days after the week in which they would otherwise be held (*d*).

(*a*) 4 & 5 Wm. 4, c. 36, s. 21.

(*b*) As to the extent of the local jurisdiction of the Sessions for the Administrative County of London, v. 51 & 52 Vict. c. 41, s. 40.

(*c*) 11 Geo. 4 & 1 Wm. 4, c. 70, s. 35, except as to the London County Sessions, which by virtue of 7 & 8 Vict. c. 71 and 22 & 23 Vict. c. 4. are held twice in each month.

(*d*) 57 Vict. c. 6.

The court is held before two or more justices of the peace, one of whom must be of the *quorum* (a). When the number of prisoners is large, a second court may be formed with the same authority as the first (b). In each court a chairman presides, and acts in general as a judge, consulting the other justices present when he thinks fit.

Who compose
the court.

Formerly this court had the power of trying any felony or misdemeanor committed in the county, except perjury at common law and forgery, and the commission in its present form does not limit their jurisdiction (c). But the justices usually remitted the more serious felonies to the assizes; and now the criminal jurisdiction of the sessions is expressly by statute confined to the trial of minor felonies and misdemeanors. And it is said that the justices in sessions cannot try any newly created offence, unless the statute which creates it expressly gives them power (d). The chief statute limiting their jurisdiction (e) precludes them from trying any of the following crimes:—

Jurisdiction of
the sessions.

Crimes not
triable at
sessions.

1. Treason, murder, or any capital felony.

2. Any felony which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life. Burglary is however an exception as a recent Act (f) has given quarter sessions jurisdiction to try this crime; but nevertheless a committing justice is to commit the person charged to the Assizes unless, owing

(a) The force of this limitation is, however, obsolete. In the commission of peace to inquire of and determine felonies and misdemeanors committed in the county, a clause is inserted directing some particular justices, or one of them, to be always included, so that no business may be done without their presence. The clause runs thus: "*Quorum aliquem vestrum, A., B., C., D., unum esse volumus*;" whence the justices so named were usually termed "justices of the *quorum*." But now the practice is to make all the justices "of the *quorum*."

(b) 21 & 22 Vict. c. 73, ss. 9-11.

(c) Arch. Q. S. 80.

(d) 2 Hawk. P. C. 47; 4 St. Com. 302; *R. v. James*, 2 Str. 1256; *R. v. Briggs*, 4 Mod. 379. There is other old authority for the proposition stated in the text, but it is believed that in practice Courts of Quarter Sessions do now try many such cases and the commissions under which they sit do not prohibit them from doing so. See 1 St. Hist. Cr. Law, p. 115; 2 Oke Mag. Syn. 718.

(e) 5 & 6 Vict. c. 38.

(f) 59 & 60 Vict. c. 57.

to the absence of any circumstances which make the case a grave or difficult one, he thinks it expedient to commit him for trial before a court of quarter sessions.

3. Misprision of treason.

4. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament.

5. Offences subject to the penalties of *præmunire*.

6. Blasphemy and offences against religion.

7. Administering and taking unlawful oaths.

8. Perjury and subornation of perjury.

9. Making, or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor.

10. Forgery.

11. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern.

12. Bigamy and offences against the laws relating to marriage.

13. Abduction of women and girls.

14. Endeavouring to conceal the birth of a child.

15. Composing, printing, or publishing blasphemous, seditious, or defamatory libels.

16. Bribery (*a*).

17. Unlawful combinations and conspiracies, except conspiracies and combinations to commit any offence which the justices or recorder have or has jurisdiction to try when committed by one person.

(*a*) See also 46 & 47 Vict. c. 51, s. 53, and 47 & 48 Vict. c. 70, s. 30.

18. Stealing, or fraudulently taking, or injuring, or destroying; records or documents belonging to any court of law or equity, or relating to any proceeding therein.

19. Stealing, or fraudulently destroying or concealing, wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

By other statutes their jurisdiction does not extend to the trial of:—

20. The misdemeanor of three or more armed persons pursuing game by night (9 Geo. 4, c. 69, s. 9).

21. Fraudulent misdemeanors by agents, trustees, bankers, factors, &c., made punishable by the Larceny Act, 1861, sections 75–86 (24 & 25 Vict. c. 96, s. 87).

22. Offences against 37 & 38 Vict. c. 36, s. 3, by personating holders of stock.

23. Offences against women and young girls, punishable by the Criminal Law Amendment Act, 1885.

In order to prevent cases falling within the jurisdiction of the sessions being unnecessarily sent to the assizes for trial, it was provided by 52 & 53 Vict. c. 12 that in such cases prisoners should not be committed to take their trial at the assizes unless the committing justices for special reasons, or the High Court of Justice, thought fit so to direct. Assizes Relief Act.

The court also hears *appeals* against summary convictions, in cases where the right of appeal is expressly given by statute to the person convicted. Under certain circumstances already noticed (a), an indictment may be removed from the sessions to the Queen's Bench by writ of *certiorari*. Appeals heard at sessions.

(a) v. p. 356.

Review of
proceedings
of sessions.

In appeals and other cases where the justices in sessions are made judges of the fact as well as of the law, their decision is final, and cannot be reversed by any court without their consent. But if they have a difficulty upon a question of law, they may put the facts in the form of a special case for the opinion of the Queen's Bench Division, meanwhile confirming or quashing the order before them. Their action will then be confirmed or quashed by the superior court. But that court will not by mandamus compel the court of quarter sessions to grant a special case (*a*). In ordinary criminal cases the only way in which the proceedings can be inquired into after judgment is by writ of error, &c. ; a subject which will be treated of hereafter (*b*).

Borough
sessions.

ii. *Borough Sessions*. — Many corporate towns or boroughs have quarter sessions of their own. This exempts them in almost every matter from the jurisdiction of the county sessions. The borough sessions have, in general, the same jurisdiction as the county sessions (*c*), being subject to the same limitations as to the trial of certain offences. The court is held at least once in every quarter of a year ; or at such other and more frequent times as the recorder may think fit, or as the Queen may be pleased to direct. The recorder of the borough, who must be a barrister of five years' standing, is the sole judge, though he may be assisted in the trial of criminals by some other barrister ; and in case of his absence may appoint a deputy.

COURT OF THE CORONER.

Coroner's
court.

The business of this court is to inquire when any one dies in prison or comes to a violent or an unnatural death, or by a sudden death of which the cause is unknown, by what means he came to his end (*d*). Moreover, a coroner has jurisdiction, and it is his duty, to hold an inquest

(*a*) *Ex parte Inhabitants of Jarvin*, 9 Dowl. 120.

(*b*) v. p. 465.

(*c*) 45 & 46 Vict. c. 50, s. 158. See also as to certain boroughs, 51 & 52 Vict. c. 41, s. 31 *et seq.*

(*d*) 50 & 51 Vict. c. 71, s. 3.

when he has information, which he honestly believes, that a death may be due to some other cause than common illness; and his jurisdiction is not affected by such information eventually proving to be untrue; it is enough that he *bond fide* believes, and has reasonable grounds for believing, that the information is such as to call for an inquest (a). If the verdict on this inquisition is murder or manslaughter, the coroner must commit the prisoner for trial (b).

The Coroner's Court also has jurisdiction to inquire as to treasure trove, who were the finders and who is suspected of concealing it (c).

There have been certain criminal courts of a private or special jurisdiction, which are restricted both in respect of the place and of the cause. One example alone of this class remains, and it is not of any great importance (d).

UNIVERSITY COURTS IN OXFORD AND CAMBRIDGE.

Both universities enjoy a certain exemption from the ordinary criminal tribunals; but at Cambridge the privilege cannot be claimed if any person not a member of the university is a party (e). In order to take advantage of this immunity, the proper course is, *after* the indictment has been found by the grand jury at the assizes or elsewhere against a resident scholar or other privileged person, for the Vice-Chancellor to claim the cognisance of the matter, and then it will be sent to one of the following courts:—

(a) 50 & 51 Vict. c. 71, s. 3; *R. v. Stephenson*, L. R. 13 Q. B. D. 331; 53 L. J. (M.C.) 176; 52 L. T. N. S. 267; 33 W. R. 244; 15 Cox, 679.

(b) 50 & 51 Vict. c. 71, s. 5. For further details as to the proceedings upon a Coroner's Inquisition, see *post*, p. 338.

(c) 50 & 51 Vict. c. 71, s. 36.

(d) The Courts of the Lord Steward, Treasurer, or Comptroller of the King's Household, to inquire if any one in the household imagined, &c., the death or destruction of the king, his privy councillors, or certain other officers, and as to murders and other crimes whereby blood has been shed in the king's palaces or abodes, are obsolete.—4 Bl. 276.

(e) 19 & 20 Vict. c. xvii. s. 18.

High Stew-
ard's court.

High Steward's Court.—It has jurisdiction over cases of treason, felony, or mayhem committed by a resident privileged person. The process at Oxford is as follows:—A special commission is issued to the High Steward and others to try the particular case. The indictment is then tried in the Oxford Guildhall by a jury *de medietate*, half of freeholders and half of matriculated laymen. If the accused is found guilty of a capital offence, the sheriff must execute the University process, to which he is bound by an oath (*a*).

Vice-Chan-
cellor's court.

Vice-Chancellor's Court.—This court has authority to try all misdemeanors committed by resident members of the university. The judge is the Vice-Chancellor.

This exceptional jurisdiction is rarely, if ever, exercised, the Vice-Chancellor's court meeting for other purposes. Formerly, however, on several occasions cases of murder and other crimes were tried in the High Steward's court.

Petty sessions and summary proceedings before single magistrates will be noticed hereafter (*b*).

SKETCH OF A CRIMINAL TRIAL.

We propose now to discuss in their proper order the various steps taken to secure the punishment of a

(*a*) 4 Bl. 278. As to the jurisdiction of the Vice-Chancellor over non-members of the University for the protection of the morals of undergraduates, v. 6 Geo. 4, c. 97; 57 & 58 Vict. c. lx.

(*b*) v. p. 473. We may mention two courts which, as far as criminal matters are concerned, have fallen into desuetude—the Sheriff's Tourn (which was indeed formally abolished by 50 & 51 Vict. c. 55, s. 18), and the Court Leet, or View of Frank Pledge. They had originally jurisdiction over most crimes, but this dwindled to the trial of trivial misdemeanors; that of the former extending to the whole county, that of the latter to a particular hundred, lordship, or manor. Another court may be said to be virtually superseded—the Court of the Clerk of the Market. Its chief business was to test the weights and measures, and to punish by fine if they were not according to the standard. Now an inspector of weights and measures, or a magistrate, may enter any place where goods are exposed for sale, and if the weights and measures are found incorrect, may seize and forfeit them; and the party in whose possession they are found, or who obstructs the examination, is fined a sum not exceeding £5; v. 41 & 42 Vict. c. 49, ss. 25, 48; 52 & 53 Vict. c. 21.

criminal who is guilty of a felony or misdemeanor, in other words, to examine the proceedings in any ordinary criminal case (a). But before doing this, it will be well to sketch a rough outline or map of the whole ground to be traversed before the offender suffers his punishment.

The first thing to be done is to lay hold of the prisoner, or to *arrest* him. When he is arrested and brought before the magistrates, if they think the case ought to be sent on to trial, he is *committed* for trial; the magistrates either at once committing him to prison to await the trial, or allowing him to remain at large on his finding sufficient *bail* to ensure his appearance when he is wanted. What particular *mode of prosecution* is to be adopted must be considered, as there are several ways of formal accusation. In most cases the prisoner will now be forthcoming to take his trial; if he has been admitted to bail and does not surrender, *process* must issue to bring him into court. For some good reason it may be desirable to remove the trial to the Queen's Bench Division by a writ of *certiorari*. The day of trial having arrived the prisoner is *arraigned*, or called to the bar of the court to answer the charge against him. If he does not confess, or stand mute, he will then show in what way he proposes to meet the charge, whether by *demurring* to the sufficiency in point of law of the charge; or by *pleading* some particular obstacle to his being convicted, or, generally, that he is not guilty. *Issue* is then joined, and the *trial* of the question in point takes place. The prisoner is said to be *convicted* on the jury finding a verdict of guilty; and *judgment* and the other consequences of this conviction, follow. The effects of this judgment may, however, be avoided by its being *reversed*, or by the prisoner being *reprieved* or *pardoned*. Lastly, if the prisoner has been convicted of a capital crime, he must suffer *execution*.

Outlines of
proceedings in
a criminal
case.

(a) That is, a case which is not dealt with summarily before the magistrates, or specially before some exceptional tribunal, as the House of Lords.

CHAPTER III.

ARREST.

Arrest, definition of.

THE apprehending or restraining of a man's person, in order to insure his being forthcoming to answer an alleged or suspected crime (*a*).

An arrest may be made either :

A. By warrant.

B. Without warrant. Here we shall have to distinguish three cases. Where the arrest is
(*a*) by an officer ; (*b*) by a private person ;
(*c*) by hue and cry.

Warrant.

A. A *warrant* is a precept under hand and seal to some officer to arrest an offender, that he may be dealt with according to due course of law.

By whom granted.

A warrant may, under certain circumstances, be granted by the Speaker of the House of Commons ; or by the Privy Council ; or by one of the Secretaries of State. A judge of the Queen's Bench Division may issue a warrant to bring before him for examination any person charged with felony. He may also issue his warrant for apprehending and holding to bail any person upon affidavit or certificate of the fact that an indictment has been found or information filed in that court against any such person for a misdemeanor (*b*). Courts of oyer and terminer (*i.e.*, in general, the assizes and Central Criminal Court) and the justices at sessions may

(*a*) It is almost unnecessary to remind the reader that a person may under certain circumstances be arrested in a civil proceeding, and not only for a crime.
(*b*) 48 Geo. 3, c. 58, s. 1.

also issue warrants against those against whom indictments for felony or misdemeanor have been found within their jurisdiction.

The above cases are of an exceptional character. Warrants usually granted by magistrates out of sessions. Warrants are ordinarily issued by justices of the peace not sitting in sessions. The law on this subject was consolidated by 11 & 12 Vict. c. 42 (a).

In what cases it may be issued.—When a charge or complaint has been made before one or more justices that a person has committed or is suspected to have committed any treason, felony, or indictable misdemeanor, or other indictable offence, within his or their jurisdiction; or that, having committed it elsewhere (even within the Admiralty jurisdiction or on land beyond the seas (b)), he resides within the jurisdiction of the justice to whom the application is made; then, if the accused is not in custody, two courses are open to the justice: (a) to issue a *warrant* to apprehend and bring the accused specially before himself, or other justices of the jurisdiction; or (b) to issue, in the first place, a *summons* directed to the accused, requiring him to appear before himself, or other justices of the jurisdiction; and afterwards, if the summons is disobeyed by non-appearance, to issue a warrant (c).

A justice will also issue a warrant to apprehend a person against whom an indictment has been found, on the production to him of the certificate of the clerk of indictments at the assizes, or of the clerk of the peace at the sessions. If the party indicted is already in custody for some other offence, the justice may issue his warrant to the gaoler, commanding him to detain the accused until he shall be removed by *habeas corpus* for the purpose of being tried on the indictment, or until he shall otherwise be removed or discharged out of his custody in due course of law (d).

(a) This statute does not affect the Metropolitan Police, or the London Police Acts.

(b) 11 & 12 Vict. c. 42, s. 2.

(c) *Ibid.* s. 1.

(d) *Ibid.* s. 3.

The information.

To enable a justice to issue a warrant in the first instance (*i.e.*, as in (a) above), it is necessary that an information and complaint in writing, on the oath or affirmation of the informant, or of some other witness on his behalf, should be laid before the justice. But if a summons only is to be issued in the first instance, the information may be by parol and without oath (*a*).

The summons.

The *summons* is directed to the accused. It states shortly the charge, and orders him to appear before the justice issuing it, or some other justice of the jurisdiction, at a certain time and place. It is served by a constable on the accused personally, or delivered to some person for him at his last or most usual place of abode (*b*).

The warrant.

The *warrant* is directed to a particular constable, or to the constables of the district where it is to be executed, or generally to the constables of the jurisdiction of the issuing justice. It states shortly the offence and indicates the offender, ordering the constable to bring him before the issuing justice, or other justices of the same jurisdiction. It remains in force until executed, the execution being effected by the due apprehension of the accused (*c*).

(a) 11 & 12 Vict. c. 42, s. 8.

(b) *Ibid.* s. 9. The following is an example of a summons:—

"To John Styles, of, &c., labourer. Whereas you have this day been charged before the undersigned, one of Her Majesty's justices of the peace in and for the said county of * * * *, for that you on, &c., at &c. (*the offence stated shortly*): These are therefore to command you, in Her Majesty's name, to be and appear before me on Thursday, the 15th day of June, at eleven o'clock in the forenoon at * * * * or before such other justice or justices of the peace for the said county as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not. •

"Given under my hand and seal, this 13th day of June, in the year of our Lord, 1876, at * * * *, in the county aforesaid. "J. H. (L. S.)."

(c) 11 & 12 Vict. c. 42, s. 10. An example of a warrant:—

"To the constable of * * * * and to all other peace officers in the said county of * * * *. Whereas, A. B. of * * * *, labourer, hath this day been charged upon oath before the undersigned, one of Her Majesty's justices of the peace, in and for the said county of * * * *, for that he on * * * * at * * * * did, &c. (*stating shortly the offence*): These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B. and to bring him before me, or some other of Her Majesty's justices of the peace in and for the said county, to answer unto the said charge, and to be further dealt with according to law. "Given under my hand, &c." (*as in the case of summons*).

It may be issued on Sunday as well as on any other day (*a*).

A warrant from the chief or other justice of the Queen's Bench Division extends all over the kingdom, and is *tested*, or *dated*, England, not Oxfordshire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be *backed*, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed in the latter (*b*). A warrant issued in England may be backed not only in another jurisdiction in England, but also in Scotland, Ireland, or the Channel Islands, and *vice versa* (*c*). Backing the warrant.

When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the justice and himself extends. And a warrant drawn up according to the statutory form will (even though the magistrate who issued it has exceeded his jurisdiction), at all events, indemnify the officer who executes the same ministerially (*d*). The officer in his own jurisdiction need not show his warrant if he tells the substance of it. The officer may break open doors to execute a warrant for treason or felony, or any indictable misdemeanor, if upon demand of admittance it cannot otherwise be obtained (*e*). An arrest for any indictable offence may be made on a Sunday; and in the night-time as well as the day. Executing the warrant.

If there is just cause, any justice or the sheriff may take of the county any number of persons he thinks proper to pursue, arrest, and imprison traitors, felons, and breakers of the peace (raising the *posse comitatus*); persons refusing to aid may be fined and imprisoned (*f*). *Posse comitatus.*

(*a*) 11 & 12 Vict. c. 42, s. 4.

(*b*) 4 Bl. 291; 11 & 12 Vict. c. 42, s. 11.

(*c*) 11 & 12 Vict. c. 42, ss. 12-15; 55 & 56 Vict. c. 55, s. 475. See also 14 & 15 Vict. c. 55, s. 18. As to the colonies, see 44 & 45 Vict. c. 69. As to the extradition of fugitive foreign criminals, see 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60, and 58 & 59 Vict. c. 33.

(*d*) 24 Geo. 2, c. 44, s. 6.

(*e*) As to killing a constable in the execution of his duty, v. p. 160; as to when he is justified in killing the accused, v. pp. 144, 160.

(*f*) Dalton, c. 171, 172.

General
warrants.

A *general* warrant to apprehend *all* persons suspected of a crime is void. So is a warrant to apprehend the authors, printers, and publishers of a libel, without naming them (*a*). General warrants to take up loose, idle, and disorderly people, and search warrants, are perhaps the only exceptions to this rule (*b*).

Search
warrants.

Though not strictly belonging to the subject in hand, namely, the arrest of criminals, it may be convenient here to notice *search warrants*. On the oath of a complainant that he has probable cause to suspect that his property has been *stolen*, and that it is upon certain premises named by him, reason for his suspicion being shown, a justice may issue a warrant to search such premises, and to seize the goods if they be found there (*c*). And as to property otherwise the subject of fraudulent practices, it is provided that if any credible witness proves upon oath before a justice a reasonable cause to suspect that any person has in his possession, or on his premises, any property with respect to which an offence punishable under the Larceny Act, 1861, has been committed, he may grant a warrant to search for such property, as in the case of stolen goods (*d*).

Again, by the Criminal Law Amendment Act, 1885, a justice of the peace may, on the oath of a parent, relative, or guardian, of any woman or girl, or other person, who, in the opinion of such justice, is *bonâ fide* acting in her interest, that there is a reasonable cause to suspect that such a woman or girl is unlawfully detained for immoral purposes in any place within his jurisdiction, issue a warrant to search such place for, and when found, to detain such woman or girl, until she be brought before

(*a*) *Money v. Leach*, 1 W. Bl. 555.

(*b*) 5 Burn, 1131. But the validity of a general *search* warrant (*i.e.*, a warrant to search in all suspected places) is at least very doubtful, and in practice such warrants are never granted, *v.* 5 Burn, 1182.

(*c*) 5 Burn. 1180; *Jones v. German*, L. R. [1896], 2 Q. B. 418; 65 L. J. (M.C.) 212; 75 L. T. 161; 45 W. R. 112; 60 J. P. 616.

(*d*) 24 & 25 Vict. c. 96, s. 103. As to searching a pawnbroker's premises for goods entrusted to a person to be finished or washed, and which are then unlawfully pawned, *v.* 35 & 36 Vict. c. 93, s. 36.

him, and then may order her to be delivered up to her parents or guardians. And he may also cause any person accused of unlawfully detaining such woman or girl to be apprehended and brought before him. A woman or girl is deemed to be unlawfully detained for immoral purposes, if she is so detained for the purpose of being unlawfully and carnally known by any man, and either (1) is under the age of sixteen years; or (2) if of or over that age, and under the age of eighteen years, is detained against her will, or that of her father, mother, or other person having the lawful charge of her; or (3) if of or above the latter age, is detained against her will (a).

Search warrants may also be granted for explosive substances suspected to be intended for felonious purposes (b), forged documents and implements of forgery (c), counterfeit coin and coinage tools (d), goods which infringe the provisions of the Merchandise Marks Act, 1887 (e), children believed to be ill-treated or neglected (f), obscene books and pictures (g), and in certain other cases.

B. Arrests without warrant.

As to arrests by officers, they may be made by

i. *Justices of the Peace*, who may themselves apprehend, or cause to be apprehended, by words only, *i.e.*, without warrant, any person committing a felony or breach of the peace in their presence (h). Arrests without warrant, by justice;

ii. The *sheriff* may apprehend any felon or breaker of the peace within the county. by sheriff;

iii. The *coroner*, any felony within the county. by coroner;

iv. A *constable* may arrest, without warrant, any one for treason, felony, or breach of the peace committed in

(a) 48 & 49 Vict. c. 69, s. 10.

(b) 24 & 25 Vict. c. 100, s. 65.

(d) *Ibid.* c. 99, s. 27.

(f) 57 & 58 Vict. c. 41, s. 10.

(h) 1 Hale, P. C. 86.

(c) *Ibid.* c. 98, s. 46.

(e) 50 & 51 Vict. c. 28, s. 12.

(g) 20 & 21 Vict. c. 83, s. 1.

his view, within his jurisdiction, and carry him before a magistrate. So, also, *on a reasonable charge of felony*, or of having given a dangerous wound; or upon his reasonable suspicion that one of the above offences has been committed, though it should afterwards appear that no felony nor wounding had been committed. But, as a rule, he may not arrest without warrant in a misdemeanor, though he may interpose to prevent a breach of the peace, and to accomplish this object he may arrest the person menacing, and detain him in custody till the chance of the threat being executed is over (a). Also he may arrest without warrant, and then must take before a justice of the peace as soon as reasonably may be, any person whom he finds lying or loitering in any highway, yard, or other place, during the night, and whom he has good cause to suspect of having committed, or of being about to commit, any felony against the Larceny, Malicious Injuries to Property, or Offences against the Person Acts respectively (b). Also he may take into custody any holder of a licence granted under the Penal Servitude Acts, or any person under police supervision whom he reasonably suspects of having committed any offence (c).

If, upon a reasonable charge for which he may arrest without warrant, the constable refuses, he may be indicted and fined. When he acts without a warrant, by virtue of his office as constable, he should, unless the party is previously acquainted with the fact, or can plainly see it, notify that he is a constable, or that he arrests in the Queen's name, and for what.

The constable's right to break open doors, his justification in killing in the execution of his duty, and the consequences of his being killed, are generally the same as if he had proceeded upon a warrant (d).

(a) v. 2 Hale, P. C. 88.

(b) 24 & 25 Vict. c. 96, s. 104; c. 97, s. 57; c. 100, s. 66.

(c) 54 & 55 Vict. c. 69, s. 2. As to arrest of persons likely to commit crimes under the Prevention of Crime Act, v. 34 & 35 Vict. c. 112, s. 7. Special Acts regulate the powers of constables within the Metropolitan Police District.

(d) v. p. 309.

v. Arrest by *private persons*.—Any person who is present when a *felony* is committed, not only may, but is bound, without warrant, to arrest the offender. And a private person is bound to assist an officer who demands his aid in the lawful taking of a felon, or the suppression of an affray, and if he refuses without good excuse, he is liable to fine and imprisonment. A private person also may arrest (a) any one whom he finds committing an *indictable offence* by night (*i.e.*, 9 P.M. to 6 A.M.) (a); or (b) a person committing *any* offence (except angling in the daytime) punishable under the Larceny Act (b); or (c) a person committing an offence against the Coinage Act (c). Also the owner of the property injured, or his servant, or any other person authorised by him, may apprehend a person committing any offence against the Malicious Injuries to Property Act (d). Any person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence punishable under the Larceny Act has been committed with respect to such property, is authorised and required to forthwith take the party offering and the property offered before a magistrate (e), who may make an order for the delivery of the property to the person appearing to him to be entitled to it (f).

Arrest by private persons.

A private person may also arrest, without warrant, on reasonable suspicion of felony. And for this purpose he may even break into a house to arrest the suspected person, if the latter be within the house and refuse to surrender (g). But the person arresting does so at his peril, and is liable to an action for false imprisonment,

Arrest by private persons on suspicion.

(a) 14 & 15 Vict. c. 19, s. 11.

(b) 24 & 25 Vict. c. 96, s. 103.

(c) *Ibid.* c. 99, s. 31.

(d) *Ibid.* c. 97, s. 61.

(e) *Ibid.* c. 96, s. 103. As to arrest in game offences, v. pp. 139, 140; for offences in the Metropolis, v. 2 & 3 Vict. c. 47, s. 66; in other towns, 10 & 11 Vict. c. 89, s. 15; of persons twice previously convicted and found on private premises without giving a satisfactory account of themselves, 34 & 35 Vict. c. 112, s. 7; of deserters, 44 & 45 Vict. c. 58, s. 154; by pawnbrokers, 35 & 36 Vict. c. 93, s. 34; arresting brawlers in churches or chapels, 23 & 24 Vict. c. 32, s. 3; of railway passengers defrauding company, 8 & 9 Vict. c. 20, ss. 103, 104.

(f) 60 & 61 Vict. c. 30, s. 1.

(g) 2 Hale, P. C. 78.

unless he can afterwards prove that a felony has actually been committed by some one, and that there was reasonable ground to suspect the person apprehended. It will be remembered that a peace officer is not liable, although no crime has been committed, if there were reasonable grounds for suspicion.

A private person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence. He may also arrest to prevent the commission of a felony or the infliction of a deadly injury (a).

Hue and cry.

Arrest upon Hue and Cry.—The old common law process of pursuing with horn and with voice all felons and such as have dangerously wounded others. The hue and cry may be raised by constables, private persons, or both. The constable and his assistants have the same powers, protection, and indemnification as if acting under the warrant of a magistrate; and if they have obtained a warrant, they may follow by hue and cry into a different county from that in which the warrant was granted, without getting it backed. Private persons who join are justified, even though it should turn out that no felony has been committed. But if a person wantonly, and maliciously, and without cause raises the hue and cry, he is liable to punishment as a disturber of the peace (b).

Rewards for the Apprehension of Offenders.

Rewards for apprehension of criminals.

In connection with the subject of arrest, we may notice some encouragements which the law holds out for exertions in bringing certain classes of criminals to justice. When any person appears to a court of oyer and terminer and gaol delivery to have been active in the apprehension of any person charged with any of the following offences, viz., murder, feloniously and maliciously shooting at any person, stabbing, cutting, poisoning,

(a) *Handcock v. Baker*, 2 B. & P. 260; 2 Hawk. P. C. p. 120.

(b) For punishment of assaults committed on officers and person acting in their aid, or on any other person lawfully authorised to apprehend or detain an offender, v. p. 185.

administering anything to procure miscarriage, rape, burglary or felonious housebreaking, robbery from the person, arson; horse, bullock, or sheep stealing; or with being accessory before the fact to any of the offences aforesaid; or with receiving stolen property knowing the same to have been stolen, the court is authorised to order the sheriff to pay to such person such sum of money as it thinks proper to compensate for his expense, exertion, and loss of time in the apprehension. This reward is to be over and above the ordinary payments to prosecutors and witnesses (a). By a later statute, at the sessions the court may order such compensation to be paid in case of any of the above offences which they have jurisdiction to try; but the payment to one person must not exceed £5 (b). If any one is killed in endeavouring to apprehend a person charged with one of these offences, the court may order compensation to be paid to the family (c). The amount to be paid in all such cases is subject to regulations which may be made from time to time by the Secretary of State (d).

Rewards
allowed at
sessions.

(a) 7 Geo. 4, c. 64, s. 28.

(c) 7 Geo. 4, c. 64, s. 30.

(b) 14 & 15 Vict. c. 55, s. 8.

(d) 14 & 15 Vict. c. 55, s. 5.

CHAPTER IV.

PROCEEDINGS BEFORE THE MAGISTRATE.

Accused to be
taken at once
before the
magistrate.

WHEN an arrest has been made the accused must be taken before a magistrate or magistrates as soon as possible.

Proceedings
before the
magistrate.

The magistrate is bound to forthwith examine into the circumstances of the charge. In order to secure the attendance of witnesses to the fact, they may be served with a summons or warrant in a manner similar to that in which the presence of the accused is insured. If a witness refuses to be examined, he is liable to imprisonment for seven days (*a*). The room in which the examination is held is not to be deemed an open court; and the magistrate may exclude any person if he thinks fit (*b*). When the witnesses are in attendance, the magistrate takes, in the presence of the accused (who is at liberty by himself or his counsel to put questions to any witness produced against him), the statement on oath or affirmation of those who know the facts of the case, and the magistrate's clerk puts the same in writing. These statements (technically termed *depositions*) are then read over to and signed respectively by the witnesses who have been examined, and by the magistrate taking such statements (*c*). If the person called to give evidence object to be sworn, and state as the ground of such objection, either that he has no

The deposi-
tions.

(*a*) 11 & 12 Vict. c. 42, s. 16. As this is the chief Act dealing with the subject of this chapter, reference merely to a section must be understood of that statute.

(*b*) s. 19. But the contrary is the case where magistrates deal with matters falling within their *summary jurisdiction*, v. 11 & 12 Vict. c. 43. s. 12.

(*c*) s. 17.

religious belief, or that the taking of an oath is contrary to his religious belief, he may be permitted to make a solemn affirmation, instead of taking an oath (*a*). There are two cases in which a witness may give evidence not on oath. The first is upon a charge, under the Criminal Law Amendment Act, 1885, of defiling a girl under thirteen years of age. In such a case, the girl may, if in the opinion of the court she does not understand the nature of an oath, give evidence not on oath, though such evidence must be corroborated by other material evidence (*b*). There is also a similar provision in the Prevention of Cruelty to Children Act, 1894, by which not only the child alleged to have been cruelly treated, but also any other child tendered as a witness, may, under similar restrictions, give evidence without being sworn, if the child is in the opinion of the Court of sufficient intelligence to justify such a course (*c*).

The depositions, having been completed, are read over in the presence of the accused, and the magistrate asks him if he wishes to say anything in answer to the charge; cautioning him that he is not obliged to say anything, but that whatever he does say will be taken down in writing, and may be used in evidence against him at his trial; at the same time explaining that he has nothing to hope from any promise and nothing to fear from any threat which may have been held out to him to induce him to make any confession of guilt. Whatever the accused then says is taken down in writing, and signed by the magistrate (*d*). The right Witnesses for
the accused. which the defendant has to make an unsworn statement of this kind is not in any way affected by the Criminal Evidence Act, 1898 (*e*), and he may now either make such a statement, or give sworn evidence on his own behalf like any other witness (*f*). The accused is then

(*a*) 51 & 52 Vict. c. 46, s. 1.

(*b*) 48 & 49 Vict. c. 69, s. 4; v. *ante*, p. 169.

(*c*) 57 & 58 Vict. c. 41, s. 15.

(*d*) s. 18.

(*e*) 61 & 62 Vict. c. 36, s. 1.

(*f*) As to the mode of giving evidence by the defendant, see p. 394.

asked whether he desires to call any other witnesses, and if he does, their evidence is taken. These depositions, in the same way as those on the part of the prosecution, are read to and signed by the witnesses and by the magistrate and the defendant's witnesses (other than those merely to character), are bound by recognizance to give evidence at the trial (*a*). If a witness refuses to enter into such recognizances, he may be committed to prison until the trial. The recognizances, depositions, &c., are transmitted to the court in which the trial is to take place (*b*).

Binding over
the witnesses.

Remand.

If the investigation before the magistrate cannot be completed at a single hearing, he may from time to time *remand* the accused to gaol for any period not exceeding eight days; or may allow him his liberty in the interval upon his entering into recognizances, with or without sureties, for reappearances (*c*).

Discharge.

Committal
for trial.

If, when all the evidence against the accused has been heard, the magistrate does not think that it is sufficient to put the accused on his trial for an indictable offence, he is forthwith discharged. But if he thinks otherwise, or the evidence raises a strong or probable presumption against the accused, he *commits* him for trial, either at once sending him to gaol so as to be forthcoming for trial, or admitting him to bail (*d*). Under certain circumstances a third course is open to the magistrate; he may dispose of the case and punish the offender himself (*e*).

The accused
committed
for trial.

It will be noticed that there are two forms of commitment to prison: (*a*) *for safe custody*; (*b*) *in execution*, either as an original punishment, or as a means of enforcing payment of a pecuniary fine, or of enforcing obedience to the sentence or order of a magistrate or the sessions. The warrant of commitment, under the hand and seal of the committing magistrate, directed to the gaoler, contains a concise statement of the cause of com-

(*a*) 30 & 31 Vict. c. 35, s. 3.

(*c*) s. 21.

(*d*) s. 25.

(*b*) s. 20.

(*e*) v. p. 477 *et seq.*

mitment. By the Habeas Corpus Act (*a*) the gaoler is required, under heavy penalties, to deliver to the prisoner, or other person on his behalf, a copy of the warrant of commitment or detainer within six hours after demand. The imprisonment of which we are now speaking is ^{Imprisonment pending trial.} merely for safe custody and not for punishment; therefore, those so imprisoned are treated with much less rigour than those who have been convicted. Thus, they may have sent to them food, clothing, &c., subject to examination and the rules made by the visiting magistrates. They have the option of employment, but are not compelled to perform any hard labour; and if they choose to be employed, and are acquitted, or no bill is found against them, an allowance is paid for the work (*b*).

Bail.—The admitting to bail consists, in theory, in ^{Bail.} the delivery (or bailment) of a person to his sureties, on their giving security (he also entering into his own recognizances) for his appearance at the time and place of trial, there to surrender and take his trial. In the meantime, he is allowed to be at large; being supposed to remain in their friendly custody. But a justice may now dispense with sureties and release the accused person on his own recognizances if in the opinion of the magistrate this course will not tend to defeat the ends of justice (*c*).

We shall, in the first place, treat of the law of bail by the magistrate, and then of bail by the Queen's Bench Division, and other exceptional cases.

In what cases may, and in what cases may not, a ^{In what cases a magistrate may bail.} magistrate take bail? Not if the prisoner is accused of *treason*. In that case it is allowed only by order of a Secretary of State, or by the Queen's Bench Division, or a judge thereof in vacation. If the prisoner is charged

(*a*) 31 Car. 2, c. 2, s. 5.

(*b*) 28 & 29 Vict. c. 126, ss. 20, 32, 33.

(*c*) 61 & 62 Vict. c. 7.

with some other *felony*, or one of the misdemeanors enumerated below, or an attempt to commit a felony, the magistrate may, in his discretion, but is not obliged to, admit to bail. The misdemeanors above-mentioned are: Obtaining, or attempting to obtain, property by false pretences; receiving property stolen or obtained by false pretences; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful or indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a peace officer in the execution of his duty or upon any person acting in his aid; neglect or breach of duty as a peace officer, or any misdemeanor for the prosecution of which the costs may be allowed out of the county rate. In other misdemeanors it is imperative on the magistrate to admit to bail (a).

Principles guiding magistrates, when they may exercise their discretion as to bail.

In cases where, in the exercise of their discretion, the magistrates have the power of admitting to bail or refusing it, the principle which is to guide them is the probability of the accused appearing to take his trial, and not his supposed guilt or innocence (b), though this latter point may be one element to be considered in applying the test. Thus it has been laid down that the points which the court will consider in exercising their discretion include the seriousness of the charge, the evidence in support of it, and the punishment which the law awards for the offence (c). Practically, in charges of murder, bail is never allowed. And when a bill of indictment has been found against the accused, naturally more caution will be exercised.

The sureties.

Who may be bail? The magistrate (or court, v. *infra*) will act according to his discretion as to the sufficiency of the bail, and the proposed bail may be examined upon oath as to their means. A married

(a) s. 23.

(b) *R. v. Scaife*, 9 Dowl. P. C. 553; 5 Jur. 700.

(c) *In re Barronet*, 1 E. & B. 1; Dears. C. C. 51; 22 L. J. (M.C.) 25; 17 Jur. 184; *In re Robinson*, 23 L. J. (Q.B.) 286. See also *R. v. Stephen Butler*, 14, Cox, 530.

woman, an infant, or a prisoner in custody, cannot be bail; nor can a person who has been convicted of an infamous crime, as perjury (*a*). The usual number of bail is two; but sometimes only one is required, and sometimes three or more. The sureties or bail are not compelled to act as such for a longer time than they wish. If they surrender the accused before the magistrate or court by whom he has been bailed, he will be committed to prison, and they will be discharged of their obligation. But the accused may then find fresh sureties.

Both at common law and by statute (*b*), to refuse or delay to admit to bail any person bailable is a misdemeanor in the magistrate. But it has been held that the duty of a magistrate in respect of admitting to bail is a judicial duty; and therefore that not even an action can be maintained against him for refusing to admit to bail, where the matter is one as to which he may exercise his discretion (*c*). It is provided by the Bill of Rights that excessive bail ought not to be required; though what is excessive must be left to be determined by the court in considering the circumstances of the case. If the magistrate or other authority admits to bail where this is not allowable, or if he takes insufficient bail, he is liable to punishment on the non-appearance of the accused (*d*).

Refusing or
delaying bail.

Excessive bail.

The stage in the proceedings where the question of bail usually arises is when the accused is before the magistrates. But when a person charged with an indictable offence has been committed to prison to await his trial, it is lawful at any time afterwards, before the first day of the sessions or assizes at which he is to be

Bail after
committal for
trial.

(*a*) *v. R. v. Edwards*, 4 T. R. 440.

(*b*) 3 Edw. 1, c. 15; 31 Car. 2, c. 2 (Habeas Corpus); 1 Wm. & M. Sess. 2, c. 2 (Bill of Rights).

(*c*) *Linford v. Fitzroy*, 13 Q. B. 240; 18 L. J. (M.C.) 108; 13 Jur. 303; *R. v. Badger*, 4 Q. B. 468; D. & M. 375; 12 L. J. (M.C.) 66; 7 Jur. 216.

(*d*) Hale's Sum. 97.

tried, for the magistrate who signed the warrant for his commitment to admit him to bail (*a*).

As to bail in other cases than in proceedings before the magistrates:—

Bail by
Queen's Bench
Division.

The *Queen's Bench* Division has a discretionary power of admitting to bail a prisoner charged with any indictable offence, or on suspicion thereof; and this whether he is brought before the court by a writ of *habeas corpus* or otherwise. The application for bail is, in the first instance, made by summons before a judge at chambers (*b*). The decision of a Divisional Court on a question of bail is a judgment of the High Court in a criminal matter, and there is therefore no appeal to the Court of Appeal (*c*). It may bail as well in cases where bail has been refused by the magistrate, as when the charge has been originally brought before the Division. It may order the accused to be admitted to bail before a magistrate when it is inconvenient to bring him and his bail up to town.

Bail by judicial
officers.

It seems to be a general rule that so far as any persons are judges of any crime, so far they have the power of bailing a person indicted before them of such crime (*d*); so that:

Justices in Session may bail persons indicted at the sessions.

Judges of Gaol Delivery, &c., may bail those indicted at the assizes or Central Criminal Court when they are sitting. If one accused of treason or felony is not tried at the first sessions of gaol delivery after commitment, he may demand to be released or bailed, unless it appears on oath that the witnesses for the prosecution could not be present at those sessions. If he is not tried at the second sessions, he must be discharged from imprisonment (*e*).

(*a*) 11 & 12 Vict. c. 42, s. 23. (*b*) Crown Office Rules, 1886, r. 122.

(*c*) *R. v. Foote*, L. R. 10 Q. B. D. 378; 52 L. J. Q. B. D. 528; 48 L. T. (N.S.) 394; 31 W. R. 490; 48 J. P. 36; 15 Cox, 250.

(*d*) 2 Hawk. c. 15, s. 54.

(*e*) 31 Car. 2, c. 2, s. 7. But see *R. v. Bowen*, 9 C. & P. 509.

Coroners are authorised to admit to bail persons charged with manslaughter by verdict of the coroner's jury (*a*).

In addition to judicial officers, police officers have a limited power of taking bail.

Police Officers.—If a person taken into custody for an offence without a warrant, cannot be brought before a Court of Summary Jurisdiction within twenty-four hours from the time when he is arrested, a superintendent or inspector of police, or the officer in charge of any police station, must inquire into the case and, except where the offence appears to him to be of a serious nature, he must discharge the prisoner upon his giving bail with or without sureties for a reasonable amount to appear before the court (*b*). Bail by police officers.

It may be noticed here that at any time between the conclusion of the examination before the magistrate and the first day of the trial at the assizes or sessions, the accused, whether held to bail or committed to prison for trial, may have on demand copies of the examination of the witnesses upon whose depositions he has been so held to bail or committed, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words (*c*). And at the time of trial he may inspect the depositions without any fee (*d*). The same rules apply also to depositions on behalf of the prisoner (*e*). The accused may have copies of the depositions.

The recognizances whereby the prosecutor and witnesses are bound over to appear at the trial, together with the written information (if any); the depositions; the statement of the accused; the recognizances of bail (if any); are remitted by the magistrate to the proper officer of the court where the trial is to be had (*f*). Delivery of recognizances, &c., to the court.

(*a*) 50 & 51 Vict. c. 71, s. 5. As to personating bail, v. p. 245.

(*b*) 42 & 43 Vict. c. 49, s. 38.

(*c*) 6 & 7 Wm. 4, c. 114, s. 3; 11 & 12 Vict. c. 42, s. 27.

(*d*) 6 & 7 Wm. 4, c. 114, s. 4.

(*e*) 30 & 31 Vict. c. 35, s. 4.

(*f*) 11 & 12 Vict. c. 42, s. 20; 30 & 31 Vict. c. 35, s. 3.

CHAPTER V.

MODES OF PROSECUTION.

Modes of
prosecution.

THE accused has either been committed to prison for safe custody, or has been left at liberty in virtue of his having found sureties for his appearance. The next point to be considered is the prosecution (*a*), or manner of formal accusation. This may be either (*b*) :—

A. Upon a presentment upon oath by the jury at an inquest, or by a grand jury.

B. Without such a presentment.

After a finding
by the grand
jury.

A. The most usual mode is by indictment, and it is desirable, in the first place, to say a few words on—

Presentment.

Presentment.—This term, taken in a wide sense, includes both indictments found by a grand jury and inquisitions of office. In a narrow sense it is the formal notice taken by a grand jury of any matter or offence from their own knowledge or observation, without any bill of indictment having been laid before them at the suit of the Crown, as the presentment of a libel, nuisance, &c., upon which the officer of the court must afterwards frame an indictment before the party prosecuted can be put to answer it (*c*). So that it differs from the ordinary proceeding merely inasmuch as no bill is delivered by an individual prosecutor, but the grand jury initiate the proceedings.

(*a*) In a wide sense the term “prosecution” is applied to the whole of the proceedings for bringing the offender to justice.

(*b*) 4 Bl. 301.

(*c*) *Ibid.*

An *Inquisition* of office is the act of a jury summoned to inquire of matters relating to the Crown upon evidence laid before them. The most common kind of inquisition is that of the coroner, which is held with a view to find out the cause of death. The accused is afterwards arraigned upon the inquisition (*a*). Inquisition.

An *Indictment* is a written accusation of one or more persons of a crime, preferred to, and presented on oath by, a grand jury. It lies for all treasons and felonies, for misprisions of either, and for all misdemeanors of a public nature at common law (*b*). If a statute prohibits a matter of public grievance, or commands a matter of public convenience (such as the repairing of highways, or the like), all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment if the statute specifies no other mode of proceeding (*c*). If the statute specifies a mode of proceeding different from that by indictment, then, if the matter was already an indictable offence at common law, and the statute introduces merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute (*d*). Indictment,
when it lies.

We shall presently deal with the preferment of an indictment to the grand jury; but first we must examine into the nature of such form of accusation. And for this purpose it will be well to give an example of an indictment, say for larceny at common law : Indictment,
its form.

“ Suffolk, to wit : The jurors for our Lady the Queen upon their oath present that ¶ John Styles, on the 1st day of June, in the year of our Lord 1876, three pairs of shoes, and one waistcoat, of the goods and chattels of John Brown, feloniously

(*a*) v. p. 338.

(*b*) 2 Hawk. c. 25, s. 4.

(*c*) *Ibid.* R. v. Hall, L. R. (1891), 1 Q. B. 747; 60 L. J. (M.C.) 124.

(*d*) R. v. Robinson, 2 Burr. 759.

did steal, take, and carry away; ¶ against the peace of our Lady the Queen, her crown and dignity."

Three parts marked off in the above form are to be distinguished: (a) the Commencement; (b) the Statement; (c) the Conclusion.

The commencement of an indictment.

(a) *The Commencement*.—In this the only part which requires comment is the *venue*, or the statement of the county or other division from which the grand jury by whom the indictment was found have come, and, as a general rule, where the crime was committed. It is the index of the place where, in regular course, the trial is to be had (*a*). The consideration of this matter will be reserved for a separate chapter.

The statement.

(b) *The Statement*.—This, the principal part of the indictment, must set forth with certainty all the facts and circumstances essential to constitute the crime; and must directly charge the accused with having committed it.

Name of defendant.

The defendant's *name* must be given correctly; or, if it is not known, he must be described as a person whose name is to the jurors unknown, but who is personally brought before them by the gaoler. So also with regard to the name of the person against whom the crime has been committed.

Ownership of property.

The *ownership* of any property in respect of which the offence was committed must be rightly laid. The property in goods of a deceased person must be laid in the executors or administrators, or if there are neither, then in a judge of the Probate Division. Formerly the property in goods of a married woman must have been laid in her husband, unless there had been a judicial separation, or a protection order. But by the Married Women's Property Act, 1882 (*b*), it is now sufficient to allege that the goods are the property of the wife. If the goods

(a) v. 14 & 15 Vict. c. 100, s. 23.

(b) 45 & 46 Vict. c. 75, s. 12.

belong to partners or joint-owners, one only need be named, and “another” or “others” added, as the case may be (*a*). So property vested in a body of persons must not be described as the property of the body, but of all or some individuals of the body, unless it is incorporated. Bridges, asylums, &c., maintained at the expense of a county, may be described as the property of the inhabitants of the county, without specifying any names (*b*). If goods are stolen, &c., from a bailee, they may be described as the property either of the bailor or of the bailee, unless they were stolen by the bailor himself, in which case they must be alleged to be the bailee’s property. If at the trial it appears that the property has been incorrectly laid, or the person against whom the offence was committed misnamed, unless such error be amended, the defendant must be acquitted. But, as we shall see (*c*), the court has extensive powers of ordering amendment in case of such variance between the indictment and the evidence. If the name of the person injured is not known he may be described in the indictment as “a certain person to the jurors aforesaid unknown.”

As to the statement of *time*.—No indictment will be held insufficient because it omits to state the time at which the offence was committed in any case where time is not of the essence of the offence; nor because it states the time imperfectly, or states the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened (*d*). The time is of importance in several crimes, as in murder, bigamy, and burglary, and in cases where the time within which the prosecution must be commenced is limited.

As to *place*.—The nature of the crime in some cases requires this to be stated: otherwise the venue in the

(*a*) 7 Geo. 4, c. 64, s. 14. As to joint-stock companies, see 25 & 26 Vict. c. 89, s. 18. (b) 7 Geo. 4, c. 64, s. 15.
(c) v. p. 329. (d) 14 & 15 Vict. c. 100, s. 24.

margin, that is, the county or other division, is taken as the venue for all facts in the indictment (a). The following are the most common cases in which a local description is required: burglary, housebreaking, stealing in a dwelling-house, sacrilege, nuisances to highways, &c.

Description of facts, &c.

The facts, circumstances, and intent, which are the ingredients of the offence, must be given with certainty, so that the defendant may be able to perceive what charge he has to meet, the court may know what sentence should be given, and that on future reference to the conviction or acquittal it may be known exactly what was the alleged offence (b). In indictments for certain crimes particular technical words describing the offences must be used, namely, in murder, *murdravit*; in rape, *rapuit*; in larceny, *felonice cepit et asportavit*; or rather the strict English equivalents of these Latin expressions. Again, as to the intent, treason must be laid to have been done "traitorously"; a felony, "feloniously"; burglary, "feloniously and burglariously"; murder, "feloniously and of his malice aforethought."

Technical words, when to be used.

Consequences of defects.

If any essential ingredient of the offence is omitted or not stated with sufficient certainty, the defendant may move the court before whom the indictment is found, or the Queen's Bench Division (c), to quash it, or he may demur, or, if the defect is not one which is cured by verdict (d), he may move in arrest of judgment, or bring a writ of error. All objections to formal defects must be taken before the jury are sworn; and they may then be amended by the court (e).

(a) 14 & 15 Vict. c. 100, s. 23.

(b) Arch. 60.

(c) As to moving to quash an indictment, v. Arch. 104. The motion to quash, if by the defendant, need not necessarily be made before his plea is taken, if the objection to the indictment is that it has been found without jurisdiction. But an objection to particular counts as being bad in law ought to be made before the close of the case for the prosecution. v. *R. v. Chapple*, 17 Cox, 455; 66 L. T. 124; 56 J. P. 360.

(d) As to what defects are cured by verdict, see *Heymann v. R.*, L. R. 8 Q. B. 102; 28 L. T. (N.S.) 162; 21 W. R. 357; 12 Cox, 383. It is only averments *imperfectly stated* which under any circumstances are curable by verdict. If an essential averment be omitted the defect is incurable.

(e) 14 & 15 Vict. c. 100, s. 25.

The law as to the *amendment* of defects in the indictment is now on a much more reasonable footing than it was at one time. Instead of requiring the evidence rigorously and servilely to correspond with the indictment as it stands when drawn up, extensive powers of amendment are given to the court. Whenever there is a variance in certain points between the indictment and the evidence, it is lawful for the court before which the trial is had, if it considers that the variance is not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended on such terms, as to postponing the trial, as the court thinks reasonable. The points mentioned in the statute are the following: (a) in the name of any *place* mentioned or described in the indictment; or (b) in the name or description of any person or persons, therein alleged to be the *owner* or owners of any property which shall form the subject of any offence charged therein; or (c) in the name or description of any person or persons, therein alleged to be *injured* or damaged, or intended to be injured or damaged, by the commission of such offence; or (d) in the Christian name or surname, or other description of *any person* or persons whomsoever therein named or described; or (e) in the name or description of *any matter* or thing whatsoever therein named or described; or (f) in the *ownership* of any property named or described therein (a). But in no case will an amendment which alters the nature or quality of the offence be allowed (b). The amendment must be made before verdict; and when it is once made there can be no amending the amendment, or reverting to the indictment in its original form.

Amendment
of defects.

(c) • *The Conclusion.* — The conclusion given in the foregoing example of an indictment is that which occurs in an indictment for an offence at common law. An

The conclusion
of the indictment.

(a) 14 & 15 Vict. c. 100, s. 1.

(b) *R. v. Wright*, 2 F. & F. 320; *R. v. James*, 12 Cox, 127.

indictment for an offence created by statute concludes thus: "Against the form of the statute in such case made and provided, and against the peace," &c. But an error in the form of the conclusion is not now material, inasmuch as it has been enacted that no indictment shall be held insufficient for the omission of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versa*; nor for want of a proper or formal conclusion (a).

Counts, when more than one inserted.

Counts.—An indictment very frequently contains more than one count or charge. The object of the insertion of more than one count is either to charge the defendant with different offences, or with a previous conviction; or to describe the single offence in other terms, so that proof of one description failing, he may be convicted under another. Thus, an indictment for wounding generally contains a count for doing grievous bodily harm. Again, an indictment for obtaining goods by false pretences must state the false pretence correctly; therefore in order to prevent a failure of justice in consequence of the false pretence not being properly stated, it is often necessary to insert different counts laying the pretence in different ways. The different counts are tacked on by the insertion of "and the jurors aforesaid, upon their oath aforesaid, do further present that," &c.

Charging more than one offence in the same count.

As a rule more than one offence cannot be charged in the same count. This is commonly expressed by saying that a count must not be *double*, or is *bad for duplicity*. Thus one count cannot charge the prisoner with having committed a murder and a robbery. There are two

(a) 14 & 15 Vict. c. 100, s. 24. The same section also provides that no indictment shall be insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," nor for that any person is designated by a name of office or other descriptive appellation, instead of his proper name; nor for want of, or imperfection in, the addition of any defendant; nor for the want of the statement of the value or price of any matter or thing, or of the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil is not of the essence of the offence.

exceptions to the rule: An indictment for burglary usually charges the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. And in indictments for embezzlement by clerks, or servants, or by persons employed in the public service, or in the police, the prosecution may charge any number of distinct acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive (a). But even here it is usual to charge the different acts in different counts.

So much for charging different offences in one count. It remains to be seen what are the rules as to charging a defendant with different offences in different counts of the same indictment:—

In an indictment for *treason*, there may be different counts, each charging the defendant with different species of treason; for example, compassing the Queen's death, levying war, &c.

In an indictment for *felony*, there is no objection in point of *law* to charging several different felonies in different counts, whether such felonies be of a different character or distinct cases of the same sort of felony; for example, whether they be a burglary and a murder, or two cases of murder. But in *practice*, as this course might embarrass the prisoner in his defence, it is not adopted, and it will be ground for quashing the indictment, though not for demurrer or arrest of judgment. If it is discovered, before the jury are charged, that it has been done, the judge may quash the indictment; if after, he may put the prosecutor to his election on which charge he will proceed (b). The same felony may, however, be charged in different ways in different counts; as if there is a doubt whether the goods stolen are the property of A. or B., they may be stated in one count as the goods of A., in another as the goods of B. There are

(a) 24 & 25 Vict. c. 96, s. 71; see also s. 5.

(b) Arch, 78, 79.

certain exceptions to the rule forbidding the charging of distinct felonies in different counts. In an indictment for feloniously stealing any property, it is expressly declared lawful to add a count or several counts for feloniously receiving the *same* property, knowing it to have been stolen, and *vice versa*; and the prosecutor is not put to any election, but the jury may find a verdict of guilty on either count, against all or any of the persons charged (*a*). Also, in an indictment for larceny, it is lawful to insert several counts against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within six months from the first to the last of such acts, and to proceed thereon for all or any of them (*b*). We have already noticed a similar rule with regard to embezzlement (*c*).

Joinder of a
felony and a
misdemeanor.

If a count for a *felony* is joined with a count for a *misdemeanor*, the indictment will be held bad if demurred to, or judgment may be arrested if the verdict has been general (*i.e.*, guilty or not guilty on the whole indictment), but not if the prisoner is convicted of the felony alone (*d*).

Charging different
misdemeanors in
different
counts.

An indictment for *misdemeanor* may contain several counts for different offences, even though the judgments upon each be different, so that the legal character of the substantive offences charged be the same (*e*). Thus, evidence of several assaults or several libels will be received on the several counts of the same indictment. But there are limits, not precisely defined, to this rule; when convenience and justice demand it, the judge will compel the prosecution to elect upon which charge they will proceed. In all cases of this character, the important consideration is, whether all the acts were

(*a*) 24 & 25 Vict. c. 96, s. 92.

(*b*) *Ibid.* s. 5.

(*c*) v. p. 331.

(*d*) *R. v. Ferguson*, Dears. C. C. 427; 24 L. J. (M.C.) 61; 1 Jur. (N.S.) 73.

(*e*) v. *Young v. R.*, 3 T. R. 105; 1 Leach, C. C. 505; 2 East, P. C. 82.

substantially one transaction, or at any rate similar transactions. If they were not the prosecutor will probably be compelled to elect in respect of which offence he will proceed.

In certain cases if the prisoner has been *previously convicted*, a count is inserted in the indictment charging him with such previous conviction. If he be convicted of the main offence charged by the indictment, he will have to plead to the count for the previous conviction, and proof may be given, if he denies it, as on any other count. The object of putting in this count is that the prisoner may have his identity with the person so previously convicted proved before the severer punishment consequent on a previous conviction is awarded. The cases in which such a count may be inserted are indictments for (a) felonies, (b) uttering or possessing counterfeit coin, (c) obtaining goods or money by false pretences, (d) conspiracy to defraud, or (e) being found at night armed with intent to break into a dwelling-house, or with housebreaking implements (a).

Previous conviction, when count for.

It should be noticed that in some cases the necessity for adding a second count, or preferring a second indictment, is obviated by the power which is given to the jury to find the defendant guilty of certain other offences than those named in the indictment (b).

Verdict of offence other than that charged in the indictment.

As to the *joinder of two or more defendants* in one indictment.—When several persons take part in the commission of an offence, they may all be indicted together, or any number of them together, or each separately; and, of course, some may be convicted and others acquitted. But certain offences do not admit of a joint commission, for example, perjury. The misjoinder of defendants may be made the subject of demurrer, motion in arrest of judgment, or writ of error: or the court will in general quash the indictment.

Joinder of defendants.

(a) 24 & 25 Vict. c. 96, ss. 7, 8, 9, 116; c. 99, ss. 12, 37; 34 & 35 Vict. c. 112, ss. 8, 9, 20.

(b) v. p. 440.

Cases in which the time for prosecution is limited.

As a rule there is no *time limited* after the commission of a crime within which the indictment must be preferred (*a*). The offender is continually liable to be apprehended and visited with the penalties of the criminal law. By particular statutes, however, there are exceptions to this rule; a stated time being fixed after which criminal proceedings cannot be commenced. The chief cases, times, and the statutes regulating them, are the following:—

Treason (except by endeavouring to assassinate the sovereign), if committed in Great Britain, three years, 7 & 8 Wm. 3, c. 3, s. 5.

Training to arms and military practice, six months, 60 Geo. 3 & 1 Geo. 4, c. 1, s. 7.

Night-poaching offences punishable under 9 Geo. 4, c. 69, twelve months.

Offences under the Customs Act, three years, 39 & 40 Vict. c. 36, s. 257.

Corrupt or illegal practices at elections, one year, 46 & 47 Vict. c. 51, s. 51; 47 & 48 Vict. c. 70, s. 30.

Indictments or informations upon any statute penal, whereby the forfeiture is limited to the sovereign, and unless such statute provides a shorter limitation, two years, or, where the forfeiture is limited to the sovereign and prosecutor, one year, 31 Eliz. c. 5.

Carnally knowing a girl between the ages of thirteen and sixteen years, or attempting the same, three months, 48 & 49 Vict. c. 69, s. 5.

Prosecutions for acts done in execution or intended

(*a*) It must be understood that this applies only to indictable offences, and not to offences punishable upon summary conviction. With regard to the latter, criminal proceedings must, as a general rule, be commenced within six months from the commission of the offence, 11 & 12 Vict. c. 43, s. 11, but there are many exceptions.

execution of any Act of Parliament or of any public duty or authority, or for neglect or default in the execution of such act or duty, must be brought within six months, 56 & 57 Vict. c. 61, s. 1.

The indictment is usually drawn up by an officer of the court—the clerk of arraigns or the clerk of indictments at the assizes, the clerk of the peace at the sessions; but in cases of difficulty the assistance of counsel is obtained. On the indictment are indorsed the names of the witnesses intended to be examined before the grand jury. Here we must leave it for a time, merely adding that of course any number of indictments may be preferred against the same person at the same time for distinct offences.

Indictment drawn up and indorsed.

B. *Information.*

A criminal information is a complaint on behalf of the Crown in the Queen's Bench Division in respect of some offence, not a felony, whereby the offender is brought to trial *without a previous finding by a grand jury* (a).

Information, definition of.

These criminal informations are of two kinds :—

- i. Informations *ex officio*.
- ii. Informations by the Master of the Crown Office.

An information *ex officio* is a formal written suggestion of an offence, filed by the Attorney-General in the Queen's Bench Division. It lies for misdemeanors only; for in treason and other felonies it is the policy

Information *ex officio*.

(a) The term "information" is also used of (i) the charge made to a magistrate of some offence punishable on summary conviction. (ii) A complaint by one who is taking proceedings to recover a penalty, as where a statute awards a pecuniary penalty upon conviction for a given offence, and a judicial proceeding is instituted against some offender to recover the penalty. Inasmuch as the penalty is generally divided between the sovereign and the informer, *qui tam pro domina regina, quam pro se ipso, sequitur*, they are termed *qui tam* actions. (iii) A complaint of the Crown in the Chancery or Queen's Bench Division in respect of some civil claim. (iv) An information *quo warranto* is a remedy in the Queen's Bench Division given against such as have usurped or intruded into any office or franchise.

of the English law that a man should not be put upon his trial until the necessity for that course has been shown by the oath of the grand jury. The reason for the exceptional proceeding without the grand jury is that some cases will not admit of the delay involved in the usual course of events. Thus, the proper objects of this kind of information are such enormous misdemeanors as peculiarly tend to disturb or endanger the Government, or to interfere with the course of public justice, or to molest public officers; for example, seditious libels or riots, obstructing officers in the execution of their duties, oppression, bribery, &c., by magistrates or officers (a). If the Attorney-General delays for twelve months to bring the case on for trial, after due notice the court may authorise the defendant to do so. An information *ex officio* is in the following form:—

“ The day of A.D.

“ *Middlesex to wit.—Be it remembered that Sir Richard Webster, Knight, Attorney-General of our present Sovereign Lady the Queen, who for our said Lady the Queen prosecutes in this behalf, in his proper person, comes here into the court before the Queen herself at the Royal Courts of Justice, London. And for our said Lady the Queen gives the court here to understand and be informed, that (state the offence, and proceed in the same manner as if it were an indictment). Whereupon the said Attorney-General for our said Lady the Queen, prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said ——— in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.*”

Information
by Master of
the Crown
Office.

ii. Information by the *Master of the Crown Office*.—A formal written suggestion of an offence, filed in the

(a) 4 Bl. 308.

Queen's Bench Division at the instance of an individual, by the Master of the Crown Office, without the intervention of a grand jury. Here, a point in which this differs from the former kind of information, the leave of the Court has to be obtained. It lies for all misdemeanors, but the Court usually will only allow this proceeding in the case of misdemeanors of a gross and notorious kind, which, on account of their magnitude or pernicious example, deserve the most public animadversion (those peculiarly tending to disturb the Government being usually left to the Attorney-General as above), for example, bribery at elections, aggravated libels, &c.

The modern rule with regard to granting criminal informations for libel is that leave will in such cases only be granted when the person libelled occupies some public office or position, and that leave will not be granted at the suit of a private person (*a*).

The course of proceedings is the following:—An application is made for a rule to show cause why a criminal information should not be filed against the party complained of. This application must be founded upon an affidavit disclosing all the material facts of the case. If the court grants a rule *nisi*, it is afterwards, upon cause being shown, discharged or made absolute as in ordinary cases.

Proceedings on information by Master of the Crown Office.

The form of this kind of information is similar to that of an information *ex officio*, substituting the name of the Queen's coroner and attorney for that of the Attorney-General.

When a criminal information has been filed either by the Attorney-General *ex officio*, or by the Master of the Crown Office, it must be tried in the usual manner by a petty jury of the county where the offence arose. For that purpose, unless the case is of such importance as to call for a trial at bar, it is sent down by writ of *Nisi*

Information, how tried.

(*a*) *R. v. Labouchere*, L. R. 12 Q. B. D. 320; 53 L. J. (Q. B.) 362; 50 L. T. (N.S.) 177; 32 W. R. 861.

Prius into that county, and tried either by a common or special jury, like a civil action. If the defendant is found guilty, he must afterwards receive judgment from the Queen's Bench Division (a).

Coroner's Inquisition (b).

Coroner's
inquisition.

A coroner's inquisition is the record of the finding of the jury sworn to inquire, *super visum corporis*, concerning a death. On this a person may be prosecuted for murder or manslaughter without the intervention of a grand jury, for the finding of the coroner's jury is itself equivalent to the finding of a grand jury. The defendant is arraigned on the inquisition as on an indictment; and the subsequent proceedings are the same. It is a common, but by no means a necessary practice, when a prisoner stands charged on a coroner's inquisition with murder or manslaughter, to take him before a magistrate, and, upon the magistrate committing him for trial, to prefer an indictment against him. He is then tried both on the inquisition and the indictment at the same time.

Proceedings
before the
coroner.

The proceedings upon a coroner's inquest are shortly the following:—On receiving due notice of the death, the coroner issues his warrant for summoning a jury (which must consist of not more than twenty-three nor less than twelve), and names the time and place of inquiry. At the court the jury are sworn, and then view the body. The witnesses are examined on oath, and their evidence is put into writing by the coroner (c). He has authority to bind by recognizance all material witnesses to appear at the assizes to prosecute and give evidence; and he must certify and subscribe the evidence and all such recognizances and the inquisition before him taken, and (if a verdict is found against any person and he is committed for trial) deliver the same to the proper officer

(a) 4 Bl. 308. For fuller details as to the practice on Criminal Informations, see Crown Office Rules, 1886. For numerous instances of the granting and refusal of leave to file a Criminal Information, see Arch. p. 124.

(b) v. p. 302.

(c) 50 & 51 Vict. c. 71, ss. 3, 4.

of the court in which the trial is to be, before or at the opening of the court (*a*).

The inquisition consists of three parts: the caption or *incipitur*, the verdict of the jury, and the attestation (*b*). The rules as to certainty, description, &c., which prevail in the case of an indictment, apply also to an inquisition and full power to amend defects or variances is given by statute (*c*). The inquisition.

If the jury (twelve of whom at least must concur in the verdict (*d*)) return a verdict of murder or manslaughter, or of being accessory before the fact to a murder, against a person, the coroner must commit him for trial, if present, and if not in custody the coroner must issue a warrant for his apprehension (*e*). Committal for trial by coroner.

If an inquest ought to be held over a dead body, it is a misdemeanor so to dispose of the body as to prevent the coroner from holding the inquest (*f*).

From the foregoing inquiry we find that, apart from proceedings by way of summary conviction, the only modes of criminal procedure are by way of indictment, information, or inquisition. Of these, proceedings by indictment are much the most common; and, unless anything be stated to the contrary, it will be this mode that will be kept in view in the succeeding pages (*g*). Proceedings rarely otherwise than by indictment.

We have already seen (*h*) that a private individual is not obliged to set the law in motion for the prosecution of a criminal. But when he has given information or made complaint before a justice of the peace, on which the party charged with an indictable offence has been

(*a*) 50 & 51 Vict. c. 71, s. 5.

(*b*) For form of Inquisition, see 50 & 51 Vict. c. 71, Sched. 2.

(*c*) *Ibid.* s. 20.

(*d*) *Ibid.* s. 4 (5).

(*e*) *Ibid.* s. 5.

(*f*) *R. v. Price*, L. R. 12 Q. B. D. 247; 53 L. J. (M.C.) 51; 15 Cox, 389; 33 W. R. 45 n.; v. also *R. v. Stephenson*, L. R. 13 Q. B. D. 331; 53 L. J. (M.C.) 176; 52 L. T. (N.S.) 267; 33 W. R. 244; 15 Cox, 679; Warb. L. C. 118.

(*g*) The old mode of proceeding by *appeal*, involving a trial by battle, was abolished after *Thornton's Case* (1 B. & Ald. 405), by 59 Geo. 3, c. 46.

(*h*) *Ante*, p. 85.

apprehended, he is then obliged to give evidence before such justice; and if the accused is committed for trial he may be, and usually is, bound over by recognizance to prosecute and give evidence (*a*).

Director of
Public Prosecutions.

In order, however, to provide more effectually for the prosecution of offences, Acts have been passed to provide for the appointment of a Director of Public Prosecutions with a staff of assistants (*b*). That office is now held by the Solicitor, for the time being, to the Treasury.

The duty of the Director of Public Prosecutions is set forth to be—to institute, undertake, or carry on, under the superintendence of the Attorney-General, criminal proceedings, and to give such advice and assistance to chief officers of police, clerks to justices, and other persons concerned in any criminal proceeding, respecting the conduct of that proceeding, as may be for the time being prescribed by rules made under the Act, or may be directed in a special case by the Attorney-General (*c*).

The rules referred to were to provide for the Director of Public Prosecutions taking action in cases of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, rendered the action of the Director necessary to secure the due prosecution of an offender (*d*).

These regulations were published in the year 1886, and are to the following effect:—

In what cases
public pro-
secutor to act.

The cases in which it shall be the duty of the Director of Public Prosecutions to carry on a criminal proceeding are: where the offence is punishable with death, or is of a class the prosecution of which had hitherto been undertaken by the Solicitor to the Treasury; or where an order in that behalf is given by the Secretary of State or the Attorney-General; or where it appears to the Director

(*a*) 11 & 12 Vict. c. 42, ss. 16, 20.

(*b*) 42 & 43 Vict. c. 22; amended by 47 & 48 Vict. c. 58.

(*c*) 42 & 43 Vict. c. 22, s. 2.

(*d*) *Ibid.* s. 2.

that the offence is of such a character that a prosecution is required in the public interest, and that, owing to the importance or difficulty of the case or other circumstances, his action is necessary to secure the due prosecution of the offender.

The Director of Public Prosecutions is also to give, in any case which appears to be of importance or difficulty, advice to clerks of justices of the peace, and to chief officers of police, and to such other persons as he may think right. Advice to clerks of justices and others.

When it is brought to his notice that a case has been reserved for the opinion of the High Court of Justice under the Act 11 & 12 Vict. c. 78, and that counsel has not been instructed for the prosecution, if he thinks the case of sufficient importance, or is directed by the Attorney-General, he is to instruct counsel to appear for the prosecution. Crown cases reserved.

The Director may also assist prosecutors by authorising them to incur special costs for obtaining scientific evidence, and plans or models, and in the payment of extra fees to counsel. Payment of special costs of private prosecutors.

The Director may employ any solicitor to act as his agent in the conduct of a prosecution. His own action is in all respects subject to the direction of the Attorney-General.

CHAPTER VI.

PLACE OF TRIAL.

Place of trial usually the county, &c., in which the crime was committed.

WE have already intimated (*a*) that the venue in the indictment, or place from which the grand jury who have found the bill have come, is also, in regular course, the place where the trial is had. It is now necessary to ascertain what that place is. The general common law rule is, that the venue should be the jurisdiction within which the offence is committed; whether such jurisdiction be a county, a division of a county, a district including more than a county, as in the case of the Central Criminal Court, or a borough.

Exceptions.

To the general rule many exceptions have been made by statute; and these we now proceed to enumerate and classify:—

In any county.

i. The venue may be laid in *any* county (*b*) for the following offences:—

Extortion (*c*).

Resisting or assaulting officers of the excise (*d*).

Offences against the Customs Acts (*e*).

Endeavouring to seduce soldiers or sailors from their duty, or inciting them to mutiny (*f*).

In county of crime, or

ii. The venue may be laid in the county where the

(*a*) v. p. 326.

(*b*) By "county" in this chapter must be understood county, division of county, district, or borough, as the case may be.

(*c*) v. 31 Eliz. c. 5, s. 4.

(*d*) 7 & 8 Geo. 4, c. 53, s. 43.

(*e*) 39 & 40 Vict. c. 36, s. 258.

(*f*) 37 Geo. 3, c. 70, s. 2; 57 Geo. 3, c. 7.

offence was committed, or where the offender is apprehended, or is in custody:—

where defendant is apprehended or in custody.

Forgery, or uttering forged matter (*a*).

Bigamy (the second marriage being the offence) (*b*).

Larceny or embezzlement by persons in the public service, or the police (*c*).

On the trial of an indictment for forgery, the jury found that the prisoner was guilty of forgery, but that there was no evidence of the forgery having been committed within the jurisdiction of the court; the prisoner was not shown to have been in custody till the time when the trial began: it was held that, as the prisoner was in custody before the court at the time of the trial, both the indictment and conviction were good (*d*).

Offences relating to the Post Office: if committed upon a mail, or person conveying letters, or in respect of a post-letter, chattel, money, &c., sent by post, the venue may be either as above, or any county through any part of which the mail, person, letter, chattel, &c., has passed in due course of conveyance by post (*e*).

iii. Either where the offence was committed, or in any adjoining county:—

In county of crime or adjoining county.

Plundering a wrecked ship (*f*).

Where the offence was committed within the county of a city or town corporate (except London, Westminster, or Southwark), *e.g.*, Berwick, Newcastle, Bristol, Chester, Exeter, and Hull, it may be tried in the next adjoining county (*g*).

(*a*) 24 & 25 Vict. c. 98, s. 41.

(*b*) *Ibid.* c. 100, s. 57.

(*c*) *Ibid.* c. 96, s. 70.

(*d*) *R. v. Smythies*, 19 L. J. (M.C.) 31; 1 Den. C. C. 498; 2 C. & K. 878.

(*e*) 7 Wm. 4 & 1 Vict. c. 36, s. 37.

(*f*) 24 & 25 Vict. c. 96, s. 64.

(*g*) 38 Geo. 3, c. 52; 51 Geo. 3, c. 100; 14 & 15 Vict. c. 55, ss. 19, 23, 24; c. 100, s. 23.

Where a felony or misdemeanor is committed on the boundary of two or more counties, or within five hundred yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county (*a*).

County in which defendant is, or is brought.

iv. In any place where the offender is, or is brought:—

Offences against the customs on the high seas, upon the offender coming to land (*b*).

Forcing on shore, or leaving behind in any place out of the Queen's dominions any of the crew (*c*).

Where the offence was committed partly in one county, partly in another.

v. In either county, where the offence was committed partly in one, partly in another:—

Uttering counterfeit coin in one county and within ten days uttering in another; or two persons acting in concert in two or more counties (*d*).

If larceny, simple or compound, is committed in one county, and the thief carries the goods into another, he may be indicted for the simple or compound larceny in the county where he committed it; or as for simple larceny in the county into which, or in any of the counties through which, he carried the goods (*e*).

Where a letter containing the false pretence alleged was written and posted by the prisoner at Nottingham to the prosecutor in France, from whom a draft for the sum of money asked for by the prisoner was received by him at Nottingham, which draft was there cashed by him, it was held that, as the false pretence was made and the money obtained by means of it received at Nottingham, there was jurisdiction to try the prisoner there (*f*).

(*a*) 7 Geo. 4, c. 64, s. 12. (*b*) 39 & 40 Vict. c. 36, s. 229.
 (*c*) 57 & 58 Vict. c. 60, ss. 187, 684.
 (*d*) 24 & 25 Vict. c. 99, s. 28. (*e*) *Ibid.* c. 96, s. 114, v. Arch. 40.
 (*f*) *R. v. Holmes*, L. R. 12 Q. B. D. 23; 53 L. J. (M.C.) 37; 32 W. R. 372.

Conspiracy, &c., where acts are done by any of the conspirators in furtherance of the design in different counties.

Libels, threatening letters, challenges, &c., either in the county from which sent, or where received. }

And, generally, where the offence is begun in one county and completed in another, the venue may be laid in either county (*a*). }

vi. In felonies or misdemeanors committed upon any person, or on, or in respect of, any property, in or upon any coach, cart, or other carriage employed in any journey, or any vessel employed in river, canal, or inland navigation, the venue may be laid in any county through which the coach, or through which or between which the vessel passed in the journey (*b*). Offences committed on journeys by land or water.

vii. Receivers of stolen property, whether charged as accessories after the fact, or with a substantive felony, or with a misdemeanor only, may be tried in the county in which they have or had the property in their possession, or in which the principal may be tried (*c*). Receivers, where tried. }

viii. In the case of felonies wholly committed within England or Ireland, accessories before the fact (who, however, may now be tried in *all* respects as if principal felons (*d*)), and accessories after the fact, may be tried (*a*) by any court which has jurisdiction to try the principal; or (*b*) in any county in which the act by reason of which such person is an accessory has been committed. In other cases (*i.e.*, when not wholly committed within England or Ireland), by any court having jurisdiction to try the principal felony or any felonies committed in any county in which the accessory is apprehended or is in custody (*e*). Accessories, where tried.

ix. Where any person being feloniously stricken, Blow, &c., followed by death.

(*a*) 7 Geo. 4, c. 64, s. 12; v. Arch. 43.

(*c*) 24 & 25 Vict. c. 96, s. 96.

(*e*) 24 & 25 Vict. c. 94, s. 7.

(*b*) *Ibid.* s. 13.

(*d*) v. p. 30.

poisoned, or otherwise hurt upon the sea, or at any place out of England and Ireland, dies in England or Ireland, or *vice versa*, the offence may be dealt with in any county in England or Ireland in which the death, or the stroke, poisoning, or hurt happened (a).

Returning
from trans-
portation, &c.

x. In indictments for being at large before the expiration of a sentence of transportation or penal servitude, the venue may be laid either in the county where the defendant is apprehended, or in that from which he was ordered to be transported, &c. (b).

Offences com-
mitted abroad.

xi. As to offences committed abroad :—

Where treason or misprision of treason is committed out of the realm (*i.e.*, out of the United Kingdom of Great Britain and Ireland), the venue may be laid in Middlesex, if the trial is to be in the Queen's Bench Division, or in such county as the Queen names, if she appoints a commission to try the offence (c).

Treasons committed in Ireland, Scotland or Wales, are not within the meaning of the enactment just referred to, but treasons committed in the Isle of Man, Guernsey, Jersey, Sark, and Alderney, or in our foreign plantations, are (d).

When a subject of the Queen commits homicide on *land* out of the United Kingdom, he may be tried in any county in England or Ireland where he is apprehended or is in custody (e).

For offences committed on the high seas and other places within the jurisdiction of the Admiralty (f), the offender may be tried in any county where he is in custody—or, if the crime is an indictable offence

(a) 24 & 25 Vict. c. 100, s. 10.

(b) 5 Geo. 4, c. 84, s. 22; 20 & 21 Vict. c. 3, s. 3.

(c) 35 Hen. 8, c. 2, s. 1. As to offences committed abroad, v. also 53 & 54 Vict. c. 37.

(d) 4 Inst. 124.

(e) 24 & 25 Vict. c. 100, s. 9.

(f) As to jurisdiction of the Admiralty, &c., v. p. 295.

mentioned in one of the Consolidated Acts, also where he is apprehended (*a*).

In the case of indictments preferred at the Central Criminal Court, the district within its jurisdiction (*b*) is to be deemed as one county, for all purposes of venue, and the venue is "Central Criminal Court, to wit." Offences committed in detached parts of counties may be dealt with as if committed in the county wholly or in part surrounding (*c*).

(*a*) 7 & 8 Vict. c. 2; 11 & 12 Vict. c. 42, s. 2, providing for the arrest and examination of the accused in the county, &c., where he may reside or be; 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68. 57 & 58 Vict. c. 60, s. 686. As to trial at the Central Criminal Court, v. 4 & 5 Wm. 4, c. 36, s. 22, and 44 & 45 Vict. c. 64, s. 2.

(*b*) v. p. 294.

(*c*) 2 & 3 Vict. c. 82, s. 1.

CHAPTER VII.

THE GRAND JURY.

THE bill of indictment (as yet it is only a “bill,” and is not correctly termed an indictment until found true by the grand jury) having been drawn up, the next step is to submit it to the grand jury.

The grand jury, how chosen.

Who are the grand jury? The sheriff of every county is required to return to every sessions of the peace, and every commission of oyer and terminer, and of gaol delivery, twenty-four good and loyal men of the county, “to inquire into, present, do and execute all those things which, on the part of our Lady the Queen, shall then be commanded them.” Grand jurors at the assizes, or at the borough sessions (at the latter they must be burgesses, 45 & 46 Vict. c. 50, s. 186), do not require any qualification by estate; at the county sessions they must have the qualification required of petty jurors (*a*). At the assizes, the grand jury generally consists of gentlemen of good standing in the county.

The grand jury sworn and charged.

After the court has been opened in the usual way by the crier making proclamation, the names of those summoned on the grand jury are called. As many as appear upon this panel are sworn. They must number twelve at least, but not more than twenty-three, so that twelve may be a majority (*b*). The usual proclamation against vice and profaneness is read; and then the person presiding in the court—the judge at the assizes, the chairman at the county sessions, the recorder at the borough sessions—

(*a*) 6 Geo. 4, c. 50, s. 1.

(*b*) 2 Burr. 1088.

charges the grand jury. The object of this charge is to assist the grand jury in coming to a right conclusion, by directing their attention to points in the various cases about to be considered by them which require special attention.

The charge having been delivered, the grand jury withdraw to their own room, having received the bills of indictment. The witnesses whose names are indorsed on each bill are sworn as they come to be examined in the grand jury room; the oath being administered by the foreman, who, as each witness is examined, writes his initials opposite to the name on the back of the bill (*a*). Only the witnesses for the prosecution are examined, as the function of the grand jury is merely to inquire whether there is sufficient ground to put the accused on his trial. If the majority of them (which majority must consist of twelve at least) think that the evidence adduced makes out a sufficient case, the words "a true bill" are indorsed on the back of the bill; if they are of the opposite opinion, the words "not a true bill" are so indorsed, and in this case the bill is said to be ignored or thrown out. They may find a true bill as to the charge in one count, and ignore that in another; or as to one defendant and not as to another; but they cannot, like a petty jury, return a special or conditional finding, or select part of a count as true and reject the other part (*b*). When one or more bills are found, some of the grand jury come into court and hand the bills to the clerk of arraigns, or clerk of the peace, who states to the court the name of the prisoner, the charge, and the indorsement of the grand jury. They then retire and consider other bills, until all are disposed of; after which they are discharged by the judge, chairman, or recorder, presiding.

Examination
of witnesses
by the grand
jury.

The finding of
the grand jury.

Consequences
of the bill
being thrown
out.

If the bill is thrown out, although it cannot again be preferred to the grand jury during the same assizes or sessions, it may be preferred and found at subsequent

(*a*) 19 & 20 Vict. c. 54, s. 1.
(*b*) Arch. 88.

assizes or sessions, of course within the time limited for the prosecution, if there be any time so limited (*a*). We may anticipate, by reminding the reader that this cannot be done in respect of the same offence if the *petty* jury have returned a verdict (*b*).

Bills preferred
without
previous
examination
before a
magistrate.

We have pursued the ordinary method of criminal procedure by supposing that, in the first instance, there has been an examination before the magistrate. But this need not always take place. With certain exceptions, a person may prefer a bill of indictment against another before the grand jury without any previous inquiry into the truth of the accusation before a magistrate, and even where the magistrate may have refused to commit for trial. This general right was, at one time, a universal right, and was often the engine of tyranny and abuse. It is easy to conceive how an innocent man's character might be injured, or at least how he might be put to great expense and inconvenience in defending himself against a charge founded on a true bill returned by the grand jury, who have heard only the evidence for the prosecution. A substantial check was put upon this grievance by the Vexatious Indictments Act (*c*). It provides that no bill of indictment for any of the offences enumerated below shall be presented to or found by a grand jury unless one of the following steps has been taken:—(*a*) The prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the accused; or (*b*) the accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer an indictment for such offence (*d*); or (*c*) unless the indictment has been preferred by the direction, or with the consent in writing, of a judge of the High Court, or the Attorney or Solicitor-General, or (*d*) in case of an indict-

Vexatious
Indictments
Act.

(*a*) Arch. 89; v. p. 334.

(*b*) v. p. 441.

(*c*) 22 & 23 Vict. c. 17, s. 1.

(*d*) See s. 2, as to a justice refusing to commit or bail a person charged before him, in which case the justice is bound, if the prosecutor require it, to bind him over to prosecute under this Act.

ment for perjury, by the direction of any court, judge, or public functionary authorised by 14 & 15 Vict. c. 100 to direct a prosecution for perjury. The offences referred to are :—Perjury, subornation of perjury, conspiracy, obtaining money or property by false pretences, keeping a gambling-house, keeping a disorderly house, indecent assault ; and now, by the Debtors Act, 1869 (*a*), any misdemeanor under the second part of that Act ; also by the Newspaper Libel and Registration Act, 1881 (*b*), libel and offences against that Act ; misdemeanors under the Criminal Law Amendment Act, 1885 (*c*) ; lastly, indictable offences under the Merchandise Marks Act, 1887 (*d*). The object of this salutary provision was furthered by a subsequent statute (*e*), which allows the court trying an indictment for any of such offences (unless the defendant has been bound over to answer the indictment) in its discretion, to order the prosecutor to pay costs and expenses to the accused in the event of the latter's acquittal. The Vexatious Indictments Act does not, however, apply to cases where the court itself has given leave for the indictment to be preferred (*f*).

Offences dealt
with in this
Act.

(*a*) 32 & 33 Vict. c. 62, s. 18.

(*b*) 44 & 45 Vict. c. 60, s. 6.

(*c*) 48 & 49 Vict. c. 69, s. 17. As to misdemeanors under this Act, v. p. 168 *et seq.*

(*d*) 50 & 51 Vict. c. 28 s. 13.

(*e*) 30 & 31 Vict. c. 35, s. 2.

(*f*) *Ibid.* s. 1.

CHAPTER VIII.

PROCESS.

Process, THE grand jury have found a true bill. The next point to be considered is the process (the writs or judicial means) issued, or made to *proceed*, to compel the attendance of the accused to answer the charge. Of course this is not required if he is in custody or if, having been bound by recognizance to appear and take his trial, he surrenders to his bail ; in such case he may be tried as soon as is convenient. If he is in custody of another court for some other offence, the course is to remove him by a writ of *habeas corpus*, and bring him up to plead. But if he is already in the custody of the same court, there is no need for such writ (*a*).

when it issues. If, however, an indictment has been found in the absence of the accused, and he is not in custody and has not been bound over to appear at the assizes or sessions, then process must issue to bring him into court.

Warrant issued by a magistrate. Process in ordinary cases is now regulated by 11 & 12 Vict. c. 42, s. 3. When an indictment has been found at the assizes or sessions against some person who is at large, the clerk of indictments, or clerk of the peace, after such assizes or sessions, upon the application of the prosecutor or any person on his behalf, will grant a certificate of such indictment having been found. Upon production of this certificate to any justice of the jurisdiction where the offence is alleged to have been committed, or in which the accused resides, or is, or is suspected of

(*a*) 30 & 31 Vict. c. 35, s. 10.

residing or being, such justice must issue his warrant to apprehend the person so indicted and bring him before some justice of the jurisdiction, who, upon proof by oath that the person present is the person indicted, will, without further inquiry or examination, commit him for trial or admit him to bail (*a*). Provision is also made for the backing of such warrant if the accused is out of the above jurisdiction (*b*). If he is already in prison, the justice must issue his warrant to the gaoler, ordering him to detain him until removed by *habeas corpus* or otherwise in due course of law (*c*).

Another mode of proceeding is, for the court before whom the indictment is found to issue a *bench warrant* ^{Bench warrant.} for the arrest of the accused, and to bring him immediately before such court. At the assizes it is signed by the judge, at sessions by two justices of the peace. It has been said, however, that this process only applies to cases of misdemeanor (*d*). Any judge of the Queen's Bench Division, upon affidavit or certificate that an indictment has been found, or information filed in that court, against any person for a misdemeanor, may issue his warrant for apprehending and holding the accused to bail, and in default of bail he may commit him to prison (*e*).

In cases not provided for as above, the following are the steps. In *misdemeanors*, when an indictment is found, a writ of *venire facias ad respondendum* (which may be issued by the Queen's Bench Division, a judge of assize, or a court of quarter sessions) is issued, its nature being a summons to cause the party to appear. If he makes default in appearing to answer to this writ, a writ of *distringas* may be issued from time to time. If he still fails to appear, and the sheriff makes return that he has no lands, a writ of *capias ad respondendum*, commanding the sheriff to take his body to answer the charge, may be issued; and if he is not taken upon the

(*a*) 11 & 12 Vict. c. 42, s. 3.

(*c*) *Ibid.* s. 3.

(*d*) Arch. 93.

(*b*) *Ibid.* s. 11.

(*e*) 48 Geo. 3, c. 58, s. 1.

first *capias*, a second and a third, termed an *alias* and a *pluries*, may issue. Upon an indictment for felony a *capias* may issue in the first instance.

Outlawry

If none of these modes of summary process are effectual, the accused is liable to *outlawry*, the consequences differing according as the charge is one of misdemeanor or felony.

in misdemeanors,

First, in the case of *misdemeanors*.—The proceedings are by *venire facias*, *distringas*, *capias*, *alias capias*, *pluries capias*, as above. If none of these measures accomplish their object, a writ of *exigent* is awarded, by which the sheriff is required to proclaim or exact the defendant, and call him five successive county court days, charging him to appear upon pain of outlawry. The defendant still not appearing on the fifth county court day, judgment of outlawry is pronounced by one of the coroners for the county. The judgment of outlawry in misdemeanors operates as a conviction of contempt for not answering (*a*).

in felonies.

In *felonies* (including treason) the proceedings are in theory somewhat more summary, but in practice they are very similar to the above. The outlawry amounts to a conviction of the offence charged in the indictment, as if the defendant had been found guilty by a jury. Formerly an outlawed felon was considered as literally out of the pale of the law, and it was said (though perhaps erroneously (*b*), that he might be killed by any one; but now it would be murder, unless the killing were caused in an endeavour to apprehend him. Any one may arrest an outlaw on a criminal prosecution, either with or without writ or warrant of *capias utlagatum*, in order to give him up to the law (*c*).

Consequences of outlawry.

The general consequences of outlawry, both in felonies and misdemeanors, are the following: The person outlawed

(*a*) Arch. 93.

(*b*) v. Bracton, 128.

(*c*) 4 Bl. 319. As to the practice in outlawry, see Crown Office Rules, 1886, rr. 99–121. The most scrupulous conformity with the prescribed practice is required.

is *civiliter mortuus*. His goods are forfeited from the *exigent*, his lands from the outlawry, and the Act abolishing forfeiture in general does not interfere with this (a). He cannot hold property given or left to him. He cannot sue on his own contract, nor can he sue for the redress of any injury. He may be a witness, but cannot be a juror (b).

As to the *reversal* of the outlawry.—If there has been any mistake or omission in the proceedings, or for other cause—for example, if the defendant was in prison—the accused may have the benefit of this. In cases of felony he must render himself into custody and pray the allowance of the writ of error in person ; if it be reversed, he must still meet the indictment. In other cases he may appear by attorney (c). Reversal of
outlawry.

Process on informations is similar to that on indictments. But the first process is by writ of *subpœna*, instead of *venire* ; and then, if this is not effectual, a *capias*. But if it is necessary to proceed to outlawry, the first process is by *venire facias* (as in an indictment for misdemeanor), and not by *subpœna* (d). Process on
informations.

The appearance of the accused having been enforced in this way, or voluntarily made, the next step is to arraign him. But we must first treat of an exceptional proceeding, which sometimes at this stage intervenes to remove the proceedings to a higher court.

(a) 33 & 34 Vict. c. 23, s. 1.

(b) v. Bac. Abr.

(c) 4 & 5 Wm. & M., c. 18 ; v. *Solomon v. Graham*, 5 Ell. & Bl. 320.

(d) v. 1 Chit. Cr. L. 865.

CHAPTER IX.

CERTIORARI.

Certiorari.

WE have already ascertained where the trial of an offence will, in the regular course of things, take place. But any criminal proceeding may be removed by a writ of *certiorari* into the Queen's Bench Division, the supreme court of criminal jurisdiction. This writ is directed to the inferior court, requiring it to return the records of an indictment, or inquisition depending before it, so that the party may have a trial in the Queen's Bench Division, or before such justices as the Queen shall assign to hear and determine the cause. The result is, that the jurisdiction of the inferior court is superseded, and all subsequent proceedings there are illegal, unless the Queen's Bench remands the record back to the inferior court for trial.

When the writ should be applied for.

The proper time to apply for this writ is before issue is joined on the indictment, or at least before the jury are sworn; but it has been allowed at any time before judgment, and even afterwards, when error does not lie. But applications at such a stage are discouraged, and special cause must be shown (a).

In what cases granted.

The writ is demandable as of right by the Crown, and issues as of course when the Attorney-General or other officer of the Crown applies for it, either as prosecutor or as conducting the defence on behalf of the Crown (b). Formerly, it was granted almost of course to private prosecutors; but now by them, as by defendants, leave must be applied for, and this may be refused (c). It is

(a) 2 Hawk. c. 27, s. 28; v. *R. v. Garside*, 2 A. & E. 266.

(b) *R. v. Eaton*, 2 T. R. 89.

(c) 5 & 6 Wm. 4, c. 33; Crown Office Rules, 1886, r. 29.

also provided that no indictment (except indictments against bodies corporate not authorised to appear by attorney in the court in which the indictment is preferred) shall be removed into the Queen's Bench Division or Central Criminal Court by writ of *certiorari* either at the instance of prosecutor or of defendant (except the Attorney-General on behalf of the Crown), unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, (a) that a fair and impartial trial of the case cannot be had in the court below; or (b) that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or (c) that it may be necessary to have a view of the premises in respect whereof the indictment is preferred; or (d) that a special jury may be required to insure a satisfactory trial (a). But, among other cases, an application by the defendant will not be granted for the removal of an indictment for perjury, or other heinous misdemeanors when the delay tends to defeat the prosecution (b), nor usually for a felony (c). Nor in general will it be removed from a court of competent jurisdiction where one of the judges of the High Court presides, except by consent of the prosecutor (d).

The mode of obtaining the writ by private prosecutors or by defendants as settled by the Crown Office Rules, 1886, is the following:—

Every application for a writ of *certiorari* to remove an indictment must, during the sittings, be made to a Divisional Court by motion for an order *nisi* to show cause, and in the vacation, to a judge at chambers, for a summons to show cause; but where, from special circumstances, the court or a judge may be of opinion that the writ should issue forthwith, the order may be made absolute in the first instance. Every application must be supported by an affidavit showing the grounds

Mode of
obtaining the
writ.

(a) Crown Office Rules, 1886, r. 29.

(b) 2 Hawk. c. 27, s. 28.

(c) *R. v. Mead*, 3 D. & R. 301; *R. v. Reynolds*, 12 L. T. (N.S.) 580.

(d) Arch. 110.

upon which it is made. Upon the return of the order *nisi*, or of the summons, as the case may be, the court or judge will, if sufficient cause be shown, order a writ of *certiorari* to issue. No writ of *certiorari* will be allowed unless the person at whose instance it has been issued enters into a recognisance with sufficient sureties, conditioned to proceed forthwith to trial of the indictment, and to pay the costs of the opposite party subsequently to the removal of the indictment, in case such opposite party should succeed at the trial.

Trial at
C. C. C.

Provision is made by statute (a) for the trial at the Central Criminal Court of indictments or inquisitions for felonies or misdemeanors committed out of the jurisdiction of the Central Criminal Court, which have been removed by *certiorari* into the Queen's Bench Division; and for the removal of any such indictment or inquisition by order of the Queen's Bench Division directly into the Central Criminal Court from an inferior court.

(a) 19 & 20 Vict. c. 16, ss. 1, 3.

CHAPTER X.

TIME OF TRIAL, ETC.

A TRUE bill has been found against the defendant, and Time of trial his attendance has been secured by one of the means indicated above. When will he take his trial at the hands of the petty jury ?

Indictments for *felony* are tried at the same assizes or in felonies, sessions at which they are found by the grand jury. The trial may, however, be postponed to the next assizes or sessions, on the application of either the prosecutor or the defendant. But he must satisfy the court by affidavit that there is sufficient cause for the postponement, such as the illness or unavoidable absence of a material witness. The defendant will be detained in custody till the trial, or admitted to bail ; or, if the application for postponement is made by the prosecution, the defendant may be discharged on his own recognizances (*a*). But a judge of assize has power, on the application of the Crown, and notwithstanding the prisoner's demand for an immediate trial, to postpone such trial a second time after the bill has been found by the grand jury, without ordering the prisoner's release on bail, if satisfied that such postponement is necessary to secure the ends of justice (*b*).

In *misdemeanors*, formerly when the defendant was in misde-
meanors. not in custody, it was the practice not to try him at the same assizes or sessions at which he pleaded not guilty to the indictment, but to require him to give security to

(*a*) *R. v. Beardmore*, 7 C. & P. 497. (*b*) *R. v. Dripps*, 13 Cox, 25.

appear at the next assizes or sessions. But now it is provided generally that,—No person prosecuted is entitled to traverse or postpone the trial of any indictment found against him, provided that, if the court be of opinion that the defendant ought to be allowed a further time, either to prepare for his defence or otherwise, it may adjourn his trial to the next subsequent session, upon such terms as to bail or otherwise as may seem proper (a).

Order of trial. As to the order of trial of prisoners at the same assizes or sessions, the indictments found are filed by the clerk of arraigns or clerk of the peace in the order in which they are received from the grand jury. And, roughly speaking, this is the order of trial, felonies, as a rule, being taken before misdemeanors, and cases in which the defendant is in custody before bail cases. But this arrangement is subject to the discretion of the judge, who constantly sets it aside to suit the convenience of counsel, and for other purposes.

ARRAIGNMENT (b).

Arraignment. The arraignment, or requiring the prisoner to answer to the charge of an indictable offence, consists of three parts:—

- (a) Calling the prisoner to the bar by name.
- (b) Reading the indictment to him.
- (c) Asking him whether he is guilty or not of the offence charged.

The former practice of requiring him to hold up his hand for the purpose of identification is now generally disused, unless it be adopted in order to distinguish between two or more prisoners who are being arraigned at the same time. Nor is the prisoner now asked how he will be tried, it being taken for granted that he will

(a) 14 & 15 Vict. c. 100, s. 27. (b) *Ad rationem—ad reson—a rem.*

be tried by a jury. He is to be brought to the bar without irons, or any manner of shackles or bonds, unless there is evident danger of escape. In felonies he must be placed at the bar of the court, though in misdemeanors this does not seem necessary (a). If several defendants are charged in the same indictment, they ought all to be arraigned at the same time. It is usual to arraign several prisoners immediately in succession, and then to proceed to the trial of one, the rest being put down for the time.

The indictment having been read, or its effect shortly stated, to the prisoner, the clerk of arraigns, or clerk of the peace, or other proper officer of the court, demands of him, "How say you, John Styles, are you guilty or not guilty?" One of three courses will then be taken by the prisoner. He will either ^{Taking the plea.}

- (a) Stand mute. (b) Confess, or say that he is guilty.
(c) Plead.

Standing mute, that is, not answering at all, or ^{Standing mute.} answering irrelevantly. In former times, if, in cases of felony, this standing mute was obstinate, the sentence of *peine forte et dure* followed, and the prisoner was pressed to death (b); in treason and misdemeanor the standing mute was equal to a conviction. Later, in every case it had the force of a conviction (c). If the prisoner was dumb *ex visitatione Dei*, the trial proceeded as if he had pleaded not guilty. But now, if the prisoner stands mute of malice, or will not answer directly to the indictment or information, the court may order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered has the same force and effect as if the person had actually so pleaded (d). If it is doubtful whether the muteness be of malice or *ex visitatione Dei*, a jury of any twelve persons present may

(a) *R. v. St. George*, 9 C. & P. 483.

(b) *v. Reeve's Hist. of Eng. Law*, ii. 48, 512.

(c) 12 Geo. 3, c. 20.

(d) 7 & 8 Geo. 4, c. 28, s. 2.

be sworn to discover this. If they find him mute of malice, 7 & 8 Geo. 4, c. 28, will apply; if mute *ex visitatione Dei*, the court will use such means as may be sufficient to enable him to understand the charge and make his answer; and if this be found impracticable, a plea of not guilty will be entered, and the trial proceed.

Doubt as to
sanity of
prisoner at
time of
arraignment.

In the event of a doubt arising as to the sanity of a prisoner at the time of his arraignment, a jury will be sworn to ascertain the state of his mind. If they find him insane, so that he cannot be tried on the indictment, it is lawful for the court before whom he is brought to be arraigned to direct such finding to be recorded; and thereupon to order such a person to be kept in strict custody until Her Majesty's pleasure be known. If he does not seem able to distinguish between a plea of guilty and not guilty, this is enough to justify the jury in finding him of unsound mind. So also if he has not sufficient intellect to comprehend the nature or course of proceedings, so as to make a proper defence, and challenge jurors, and the like (a). It will be remembered that although the prisoner was sane when the crime was committed, if he appears to be insane at the time of arraignment (or indeed at any subsequent period), the trial will be deferred until he has recovered his reason (b).

Presence of
accused at the
trial.

We may notice here that no trial for felony can be had except in the presence of the prisoner. But in cases of misdemeanor, after the defendant has pleaded, the trial may go on, though he is absent, as from illness (c). In indictments or informations for misdemeanor in the Queen's Bench, the accused may appear by attorney.

CONFESSION.

Confession, or
answer of
"Guilty."

If the accused makes a simple, unqualified confession

(a) *R. v. Pritchard*, 7 C. & P. 303; *R. v. Berry*, L. R. 1 Q. B. D. 447; 45 L. J. (M.C.) 123; 13 Cox, 189.

(b) v. 40 Geo. 3, c. 94, s. 2. Insanity at the time of the commission of the crime is quite another consideration, and is treated of elsewhere, v. p. 17.

(c) Arch. 163.

that he is guilty of the offence charged in the indictment, and adheres to this confession, the court has nothing to do but to award judgment, generally hearing the facts of the case from the prosecuting counsel, and also any statement which the prisoner or his counsel may wish to make. But the court usually shows reluctance to accept and record such confession in cases involving capital punishment; often it advises the prisoner to retract the confession and plead to the indictment. When the prisoner has pleaded guilty, and sentence has been passed, he cannot retract his plea and plead not guilty (*a*). On the other hand, a prisoner who has pleaded not guilty may, by leave of the court, on the advice of his counsel or otherwise, withdraw that plea and plead guilty.

A free and voluntary confession by the defendant before the magistrate, if duly made and satisfactorily proved, is sufficient to warrant a conviction without further corroboration, but, of course, the whole of the confession must be taken into account, the part favourable to the prisoner as well as that against him. This confession, as also any free or voluntary confession, made to any other person, is merely evidence (though if the fact of the confession be undisputed no other evidence may be needed); and this is to be widely distinguished from the confession in court or plea of guilty.

In connection with this subject we must advert to the case of one of several co-defendants turning *Queen's evidence*. When sufficient evidence of a felony cannot be obtained from other quarters, and when it is perceived that the testimony of one of the accused would supply this defect, it is usual for the committing magistrate to hold out hope to this one that if he will give evidence so as to bring the others to justice he himself will escape punishment. The approval of the presiding judge will have to be obtained (*b*). Even during the trial it some-

(*a*) *R. v. Sell*, 9 C. & P. 346.

(*b*) *R. v. Rudd*, 1 Leach, 115.

times happens that the counsel for the prosecution, with the consent of the court when such a course is necessary to secure a conviction, takes one of the defendants out of the dock and puts him in the witness-box ; such prisoner obtaining a verdict of acquittal (*a*). But, as we shall see hereafter more fully, the evidence of an accomplice is to be regarded with suspicion, and requires corroboration (*b*).

(*a*) *R. v. Rowland*, Ry. & M. 401.

(*b*) v. p. 405.

CHAPTER XI.

PLEAS.

IF the defendant neither stands mute nor confesses, he Pleas.
pleads, that is, he alleges some defensive matter. The
learning on the subject of the different pleas has become
to a great extent a matter of history rather than of
practice, on account of the comprehensive character of
the plea of the general issue of not guilty, and also on
account of the right to move in arrest of judgment. The
following are the names of the various pleas which may
be pleaded:—

- | | |
|----------------------------------|----------------------------|
| i. Plea to the jurisdiction, | } termed “ <i>dilatory</i> |
| ii. Plea in abatement, |  | pleas.” |
| iii. Special pleas in bar, | |
| (a) Autrefois acquit. | |
| (b) Autrefois convict. | |
| (c) Autrefois attain. | |
| (d) Pardon. | |
| iv. General issue of not guilty. | |

Each of these will be considered separately. In the next
chapter *demurrers* will be noticed. These Blackstone
treats as pleas, whereas in truth they are rather in the
nature of objections that there is not sufficient case in
point of law to oblige the accused to plead.

It is not to be understood that a defendant may in How many
turn go through the whole of these pleas, resorting to pleas may be
resorted to.

the subsequent plea as a previous one fails. The rule is that not more than one plea can be pleaded to an indictment for misdemeanor, or a criminal information. In felonies if the accused plead in abatement, he may afterwards, if the plea is adjudged against him, plead over to the felony, that is, plead the general issue of not guilty; if he plead specially in bar he may at the same time plead not guilty to the felony (a).

Plea to the jurisdiction.

i. *Plea to the jurisdiction.*—When an indictment is taken before a court which has no cognisance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged. This want of jurisdiction may arise either from the fact that the offence was not committed within the district of the jurisdiction, for example, if a person be indicted in Kent for stabbing a person in Sussex; or because the tribunal in question has not cognisance of that class of crimes, for example, if a person be indicted at the sessions for murder.

Why seldom pleaded.

But this plea is very seldom resorted to, inasmuch as relief can be obtained in other ways. Thus the objection that the offence was committed out of the jurisdiction may generally be urged under the general issue, or, in certain cases, by demurrer, or by moving in arrest of judgment, or by writ of error. If the objection is that the crime is not cognisable in a court of that grade, though committed within the local jurisdiction, the defendant may demur, or have advantage of it under the general issue, or by moving to quash the indictment.

The truth of pleas to the jurisdiction and in abatement must be verified by affidavit.

The clerk of the peace or of the arraigns may make *replication*, showing that the offence is triable by the court. And to this the defendant may rejoin (b).

(a) *R. v. Charlesworth*, 1 B. & S. 460; 31 L. J. (M.C.) 26.

(b) This pleading, which is in writing, is done out of court, and must be distinguished from the objections taken under the general issue by the prisoner in court.

Again, if a magistrate has proceeded or is proceeding in a matter in which he has no jurisdiction, he may be stopped by a writ of prohibition from the High Court, or the proceedings may be quashed by the High Court on a writ of *certiorari* being obtained.

ii. *Plea in abatement*.—This is another dilatory plea, formerly principally used in the case of the defendant being misnamed in the indictment; for example, if a ~~wrong Christian~~ name or addition were given. But even if the defendant were successful on this plea, a new bill of indictment with the correction might at once be framed. The plea is now, however, virtually obsolete. It has been enacted that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, if the court be satisfied of the truth of the plea. The court will cause the indictment or information to be amended, and will call upon the party to plead thereto, and will proceed as if no such dilatory plea had been pleaded (*a*). And no indictment is to be held insufficient for want of, or imperfection in, the addition of any defendant (*b*). Plea in abatement.

iii. *Special pleas in bar*.—These are termed “special” to distinguish them from the general issue; and “in bar” because they show reason why the defendant ought not to answer at all, nor put himself upon his trial for the crime alleged, and thus they are distinguished from dilatory pleas which merely postpone the result. Special pleas in bar.

All matters of excuse and justification may be given in evidence under the general issue; therefore it is hardly ever necessary to resort to a special plea in bar, except in the four cases to be examined more in detail (*c*).

(*a*) 7 Geo. 4, c. 64, s. 19.

(*b*) 14 & 15 Vict. c. 100, s. 24. We have already adverted to the large powers of amendment which are given to the court by this statute.

(*c*) “In fact, the only instance in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, &c., and wishes to throw the onus of repairing upon some person or persons not bound of common right to repair it.”—Arch. 147.

Judgment on
such special
pleas.

If judgment on a special plea in bar is given against the defendant in a *felony*, it is to the effect that he make further answer (*respondeat ouster*); but as he generally pleads at the same time the general issue, when such judgment is given against him the jury proceed to inquire into his guilt, as if the special plea had not been pleaded. If the plea is established in his favour, he is discharged. In *misdemeanors* the judgment is final, so that if it is against the defendant he is considered guilty of the offence; if for him, he is discharged.

Plea of *autre-
fois acquit*.

(a) *Autrefois acquit*.—When a person has been charged with an offence and regularly acquitted, he cannot afterwards be indicted for the same offence, provided that the first indictment or charge were such that he could have been lawfully convicted on it (a). It is against the policy of the English law that a man should be put in peril more than once for the same offence. And therefore if he is indicted a second time, he may plead *autrefois acquit*, and thus bar the indictment. It is frequently a difficult matter to determine whether the second indictment bears such a relation to the first, that the latter is a bar to the former. The true test seems to be this—whether the evidence necessary to support the second indictment would, if true, have sustained the first (b). An acquittal for murder may be pleaded in bar of an indictment for manslaughter, and *vice versa* (c). So with larceny and embezzlement (inasmuch as upon the indictment for larceny the defendant might have been convicted of the embezzlement); robbery, and assault with intent to rob; felony, and an attempt to commit the felony. But an acquittal for larceny is no bar to an indictment for false pretences (d), as upon the larceny indictment the prisoner could not have been convicted of obtaining by false pretences;

(a) v. *R. v. Miles*, L. R. 24 Q. B. D., at p. 431.

(b) *R. v. Vanlercomb*, 2 Leach, 708.

(c) FOST. 229, 392.

(d) *R. v. Henderson*, C. & M. 328.

whereas on the other hand a conviction or acquittal upon an indictment for obtaining by false pretences is a bar to a subsequent indictment for larceny of the same goods (*a*), as upon the indictment for false pretences the defendant might have been convicted if the evidence showed a larceny (*b*). An acquittal on an indictment charging the defendant as accessory will not bar an indictment charging him as principal, and *vice versa* (*c*). And an acquittal or conviction for assault would, if the person assaulted afterwards died, be no answer to a subsequent indictment for manslaughter or murder, as the charge would be based on a new fact, viz., the death of the person assaulted (*d*). Even an acquittal by a court of competent jurisdiction abroad is a bar to an indictment for the same offence before any tribunal in this country (*e*).

The prisoner must satisfy the court first, that the former indictment on which an acquittal took place was sufficient in point of law, so that he was in jeopardy upon it (*f*); secondly, that in the indictment the same offence was charged (*g*). To prove his acquittal he may obtain a certificate thereof from the officer or his deputy having custody of the records of the court where the acquittal took place (*h*).

What acquittal must be proved.

(*b*) *Autrefois convict*.—A former conviction may be pleaded in bar of a subsequent indictment for the same offence; and this, whether judgment were given or not, provided the former indictment were valid. The same rules as in the plea of *autrefois acquit* generally apply;

Plea of *autrefois convict*.

(*a*) 24 & 25 Vict. c. 96, s. 88; *R. v. King*, L. R. [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87; 75 L. T. 392; 61 J. P. 329.

(*b*) v. p. 440.

(*c*) 2 Hale, P. C. 244.

(*d*) *R. v. Morris*, L. R. 1 C. C. R. 90. *R. v. Friel*, 17 Cox, 325.

(*e*) *R. v. Hutchinson*, 1 Leach, 135.

(*f*) *R. v. Drury*, 3 C. & K. 190; 18 L. J. (M.C.) 189.

(*g*) Parke, B., in *R. v. Bird*, 2 Den. 94, 98. v. also *R. v. O'Brien*, 46 L. T. 177; 15 Cox, 29; Warb. L. C. 246.

(*h*) 14 & 15 Vict. c. 99, s. 13.

thus there is the same test as to the identity of the crime (a).

This and the foregoing plea are usually pleaded formally on parchment and signed by counsel, but a verbal plea to the same effect would be sufficient (b).

Plea of *autrefois attaint*.

(c) *Autrefois attaint*.—Formerly when a person was attainted, so long as the attainder was in force, he was considered legally dead. Therefore a plea of an already existing attainder was a bar to a subsequent indictment for the same or for any other felony, on the ground that such second prosecution of a person already dead, and whose property had been forfeited, would be useless. But now an attainder is no bar unless the attainder be for the same offence as that charged in the indictment (c), so that practically the plea of *autrefois attaint* is a thing of the past.

Pardon.

(d) *Pardon*.—A pardon by the crown may be pleaded not only in bar to the indictment (as in the case of the three pleas just noticed), but also after verdict in arrest of judgment; or, after judgment, in bar of execution. But it must be pleaded as soon as the defendant has an opportunity of doing so; otherwise he will be considered to have waived the benefit of it. A pardon by statute need not, however, be pleaded at all. The subject will find a more convenient place hereafter (d).

The general issue.

iv. *The general issue of not guilty*.—When the prisoner, on being charged with the offence, answers *virâ voce* at the bar “Not guilty,” he is said to plead the general

(a) The reader should refer to the chapter on Summary Conviction, pp. 481, 489; where he will meet with defences similar to these pleas of *autrefois acquit* and *autrefois convict*, namely, a certificate of dismissal, or proof of having submitted to punishment, in cases of assault and battery under 24 & 25 Vict. c. 100, ss. 44, 45. So also as to dismissal or conviction under the Summary Jurisdiction Act, v. 42 & 43 Vict. c. 49, s. 27; *R. v. Miles*, L. R. 24 Q. B. D. 423; 59 L. J. (M.C.) 56; 62 L. T. 572; 38 W. R. 334; Warb. L. C. 248.

(b) St. Dig. p. 173. v. *R. v. Chamberlain*, 6 C. & P. 93.

(c) 7 & 8 Geo. 4, c. 28, s. 4.

(d) v. p. 469.

issue. The consequence is, that he is to be tried by a jury, or, as it is frequently stated, "he puts himself upon the country for trial. The plea is recorded by the proper officer of the court, either by writing the words "*po. se.*" (*posuit se super patriam*), or at the Central Criminal Court by the word "*puts.*"

This is much the most common and advantageous course for the prisoner to take; unless, indeed, he pleads guilty, and thereby the court is induced to take a more lenient view of his case. Pleading the general issue does not necessarily imply that the prisoner contends that he did not do the actual deed in question, inasmuch as it does not prevent him from urging matter in excuse or justification. Moreover, this is practically the only way in which he can urge matter in excuse or justification (a). Thus, on an indictment for murder, a man cannot plead that the killing was done in his own defence against a burglar; he must plead the general issue—not guilty—and give the special matter in evidence. The pleading of the general issue lays upon the prosecutor the task of proving every material fact alleged in the indictment or information; while the accused may give in evidence anything of a defensive character.

Advantages of pleading "Not guilty."

Issue.—When the prisoner has pleaded not guilty, the record is made up, both parties being brought to an issue, and both putting themselves upon their trial by jury. The general issue appears on the record: "*And the said John Styles forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith, that he is not guilty thereof.*" And on the part of the prosecution the *similiter* is then added: "*And John Brown*

(a) Except in the case of libel, as a defendant cannot justify or give evidence of the truth of the statements in the alleged libel unless he pleads specially that such statements were true *and* that it was for the public benefit that they should be published, and the plea must also state the particular fact by reason whereof the publication was for the public benefit. The defendant may in addition plead not guilty, 6 & 7 Vict. c. 96, s. 6. A form of such a plea of justification will be found in Arch. p. 984.

(the clerk of the arraigns, or clerk of the peace), *who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury come,*" &c. (a).

(a) For other ceremonies formerly observed, and the origin of the term "culprit," &c., v. 4 Bl. 339, or 4 St. Bl. 388 n. In actual practice the formal record is not made up unless it is required for a special purpose, although, of course, an abstract of the proceedings is always retained.

CHAPTER XII.

DEMURRER.

A DEMURRER is an objection on the part of the defendant Demurrer. who admits the facts alleged in the indictment to be true, but insists that they do not in point of law amount to the crime with which he is charged. Thus, if a person is indicted for *feloniously* stealing goods which are not the subject of larceny at common law or by statute, he may demur to the indictment, denying it to be a felony. It is for the court, on hearing the arguments, to decide whether the objection be good. The following is the form of a demurrer:—

“ And the said John Styles, in his own proper person, cometh into court here, and having heard the said indictment (or information) read, saith, that the said indictment (or information) and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said J. S., is not bound by the law of the land to answer the same ; and this he is ready to verify : wherefore, for want of a sufficient indictment (or information) in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment (or information) specified.”

If on the demurrer judgment is given *for* the defendant, it is to the effect that he be discharged, provided Judgment on demurrer. that the objection be a substantial one ; that the indictment be quashed, or amended, if it is a merely formal one (a). If judgment is given *against* the defendant, in

(a) 14 & 15 Vict. c. 100, s. 25.

felonies the judgment is final; in misdemeanors it is final, unless the court should afterwards permit the defendant to plead over (*a*).

Demurrers,
why seldom
resorted to.

Demurrers in criminal cases seldom occur in practice. Not only is there the risk of having final judgment against the defendant, but the same objections may be brought forward in other and safer ways. In cases of defects in substance apparent on the face of the indictment, generally the defendant may, instead of demurring, plead not guilty, and then, if convicted, move in arrest of judgment. Thus he has a double chance of escaping, first on the facts of the case, then on the point of law. But this course cannot be taken when the defect in the indictment is cured by verdict (*b*).

Demurrer in
abatement.

Formerly there was another kind of demurrer besides the general demurrer to which we have been referring, namely, a special demurrer, usually termed a "demurrer in abatement." This was founded on some formal defect in the indictment, whereas a general demurrer is founded on some substantial defect. But now no demurrer lies in respect of the defects specified in the 24th section of 14 & 15 Vict. c. 100 (*c*); and demurrers for other formal defects are practically rendered useless by sect. 25 of the same statute, which provides that every objection to an indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash the indictment before the jury are sworn, and not afterwards; and the court before which such objection is taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars, and thereupon the trial will proceed as if no such defect had appeared.

(*a*) This seems to be the state of the law as settled in *R. v. Faderman*, 1 Den. 569; 3 C. & K. 353; though some still contend that in felonies, after judgment against the defendant, he may still plead not guilty; and a defendant has been allowed to demur and plead not guilty at the same time.

(*b*) v. 7 Geo. 4, c. 64, s. 21; *Heymann v. R.*, L. R. 8 Q. B. 105; 28 L. T. (N.S.) 162; 21 W. R. 357; 12 Cox, 383. *R. v. Goldsmith*, L. R. 2 C. C. R. 74; 42 L. J. (M.C.) 94; Warb. L. C. 244; v. *ante*, p. 328.

(*c*) v. p. 327.

MODES OF TRIAL.

It will not be necessary to describe the various modes of trial which have long been abolished, namely, the ordeal, the corsned, trial by battle (*a*). The last of these was suppressed by 59 Geo. 3, c. 46, in consequence of a case (*b*) in which the person accused demanded the settlement of the question by a fight.

Obsolete forms
of trial.

The only modes of trial which now remain are :—

The existing
forms.

A. Trial of Peers in the House of Lords or the Court of the Lord High Steward, of which enough has been said above.

B. Trial by jury (or by the country—*per patriam*). This of course is the ordinary mode of trial, and it is this with which we have now to deal, taking the various steps in their order.

(*a*) A full account will be found in the various editions of Blackstone, Hallam's Middle Ages, Reeve's History of English Law, and the other works dealing with the history of the law.

(*b*) *Ashford v. Thornton*, 1 B. & Ald. 405.

CHAPTER XIII.

THE PETTY JURY.

WHEN the prisoner has put himself upon the country, the petty jurors are called by the clerk to answer to their names. The list which is thus called over is the panel returned by the sheriff.

Qualification
of petty jurors.

Who are liable to serve on the petty jury, and how are they returned? The law on this subject is contained chiefly in two statutes, the Jury Act, 1826 (*a*), and the Juries Act, 1870 (*b*). The qualification of common jurors is the following:—Every man between the ages of twenty-one and sixty, residing in any county in England, who has in his own name, or in trust for him, within the same county, £10 by the year above reprises in lands or tenements, or in rents therefrom, in fee simple, fee tail, or for life—or lands to the value of £20 a year held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or who, being a householder, is rated or assessed to the poor-rate or to the inhabited house duty, in Middlesex to a value of not less than £30, or in any other county not less than £20; or who occupies a house containing not less than fifteen windows—is qualified to serve on petty juries at the Royal Courts of Justice, Strand, and at the assizes, and also at both the grand and petty juries at the county sessions (*c*). Every burgess is qualified and liable to serve on the grand and petty juries at the borough quarter sessions (*d*).

(*a*) 6 Geo. 4, c. 50.

(*c*) 6 Geo. 4, c. 50, s. 1.

(*b*) 33 & 34 Vict. c. 77.

(*d*) 45 & 46 Vict. c. 50, s. 186.

Certain exemptions from serving on juries are enumerated by the Juries Act, 1870. The following are amongst those exempted:—Peers, members of Parliament, judges, clergymen, and ministers of religion; those actually practising in the law as barristers, solicitors, managing clerks, &c.; officers of the law courts, and acting clerks of the peace or their deputies; coroners; gaolers and their subordinates, and keepers in public lunatic asylums; physicians, surgeons, apothecaries, pharmaceutical chemists actually practising; officers of the navy, army, militia, or yeomanry, if on full pay; masters of vessels employed in the buoy and light service of the corporations; the household servants of Her Majesty; certain persons engaged in the Civil Service, such as officers of the post-office, commissioners of customs, &c.; officers of the police; sheriff's officers; magistrates of the Metropolitan police courts, their clerks, &c.; burgesses as regards the sessions of the county in which their borough is situated, justices of the peace, so far as relates to any jury summoned to serve at any sessions of the peace, for the jurisdiction of which they are justices; officers of the Houses of Lords and Commons (*a*). Exemptions from serving on petty juries.

These exemptions should be claimed before the revision of the list by the justices (*b*). Aliens domiciled in England or Wales for ten years or upwards may be jurors, if otherwise qualified (*c*). Persons who have been convicted of any infamous crime, unless pardoned, and outlaws, are disqualified (*d*).

Jurors who have been summoned not attending, and not giving sufficient reason for their absence, may be fined. No person who was on the grand jury by which the bill was found should sit upon the petty jury by which it is tried. Fining jurors for non-attendance.

(*a*) 33 & 34 Vict. c. 77, s. 9. (*b*) *Ibid.* s. 12. (*c*) *Ibid.* s. 8.
 (*d*) *Ibid.* s. 10. As to special jurors, v. p. 382. As to the mode of preparing the jury lists and summoning the jurors, v. 6 Geo. 4, c. 50; 25 & 26 Vict. c. 107; 33 & 34 Vict. c. 77; and Arch. 167.

Putting the jurors into the box.

The names of the jurors summoned are written on tickets and put into a box. The twelve first drawn are sworn on the jury, and absent, excused, or challenged.

Giving the prisoners their challenges.

The prisoner or prisoners, for ~~by~~ a batch of them are brought up at the same time for this purpose, are apprised of their right to object to or *challenge* any of the jurors by the clerk of the arraigns or other officer of the court in the following terms:—"Prisoners, these men that you shall now hear called are the jurors who are to pass between our sovereign lady the Queen and you upon your respective trials (or, in a capital case, upon your life and death); if, therefore, you, or any of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." The twelve jurors are then called by the proper officer. Challenges may be made not only on behalf of the prisoner, but also on behalf of the Crown. They are of two kinds: (a) For cause; (b) Peremptory. The former are either:—

- i. To the *array*, when exception is taken to the whole panel.
- ii. To the *polls*, when particular individuals are objected to.

Challenge to the array:

principal;

i. The *challenge to the array* is an objection to the whole body of jurors returned by the sheriff, not on account of their individual defects, but for some partiality or default in the sheriff or his under-officer who arrayed the panel. It may be either (a) A *principal* challenge, which is founded on some manifest partiality, as if the sheriff be the prosecutor or person injured, or be closely connected with such person, or if he have any pecuniary interest in the trial, or be influenced in his return of jurors by the prosecutor or defendant, or if he be counsel, attorney, &c., in the case; or it may be founded on some error on the part of the sheriff. If the cause of challenge is substantiated the court will quash

the array. (b) Challenge *for favour*, in cases where the ground of partiality is less apparent and direct, as when one of the parties is tenant to the sheriff, or when the sheriff has an action for ~~debt~~ depending against one of the parties.

The challenge to the array ought to be in writing, and must state specifically the ground of objection. The other side, prosecution or defence, may either plead to the challenge, traversing or denying its cause, or may demur to it as insufficient. If it is demurred to, the court will decide the demurrer. If the other side pleads to the challenge, two triers are appointed by the court (generally from the jurymen returned), and are sworn and charged to try whether the array is an impartial one. Sometimes it is tried by two coroners, or by others, the mode being left to the discretion of the court (a). If the challenge is found to be well-grounded, a new *venire* is awarded to the coroners; or, if they are interested, to the *elisors* (two clerks of the court, or two persons named by the court and sworn). The return of these elisors cannot be questioned.

Though the challenge to the array be determined against the party, he may still have—

ii. A challenge to the polls—this is also either (a) principal; or (b) for favour.

Challenge to the polls:

Principal challenges may be subdivided into these:— principal;

Propter honoris respectum—where a peer or lord of parliament is sworn on a jury for the trial of a commoner.

Propter defectum—that is, on account of some personal objection, as alienage, infancy, old age, or a want of the requisite qualification.

Propter affectum—where there is supposed to be a bias or prospect of partiality, as on account of the relationship

(a) 4 Bl. 353.

of a juror; or where an actual partiality is manifested, or where a juror has expressed a desire or opinion as to the result of the trial.

Propter delictum—if a juror has been convicted of an infamous crime (*e.g.*, treason, felony, perjury, &c.), and has not been pardoned, or has been outlawed (*a*).

for favour.

Challenges *for favour* are made when there is reasonable ground for suspicion (as if a fellow-servant be one party), but there is not sufficient ground for a principal challenge *propter affectum*.

Trial of the challenge.

The challenge to the polls is generally made orally, and must be made before the words of the oath are recited to the juror, though often the publicity of the matter is avoided by previous intimation of the objection being made to the proper officer, and in such case the juror objected to is generally not called. How is the validity of the challenge to be determined? If it is a principal challenge, by the court itself; if a challenge for favour, by two jurors who have already been sworn. But if the challenge for favour is of one of the first two jurors, the court appoints two indifferent “triers,” to try the matter; but they are superseded as soon as two are sworn on the jury. Witnesses may be called to support or defeat the challenge, and the person objected to may also be examined, but not asked questions which tend to his discredit. It should be noticed that, as a rule, a person may challenge himself, upon which he may be examined on oath as to the cause. So the sheriff may suggest the objection to his array on the ground of his relationship, &c. (*b*).

Exclusion of jurors by the Crown.

The Crown may order any number of persons called as jurors to stand by, and has not to show any cause for excluding them, until the panel has been gone through, and it appears that there will not be left enough jurors without those ordered to stand by (*c*).

(*a*) 33 & 34 Vict. c. 77, s. 10.

(*c*) *v. Mansell v. R.*, 27 L. J. (M.C.) 4.

(*b*) Arch. 175.

So much for challenges for cause, to the number of which there is no limit, and the rules as to which are generally alike both in criminal and civil cases. But there is another kind of challenge known to the criminal law alone.

Peremptory Challenge.—In felonies the prisoner is allowed to arbitrarily challenge, and so exclude, a certain number of jurors without showing any cause at all. He cannot claim this right in misdemeanors; but it is usual, on application to the proper officer, for him to abstain from calling any name objected to by the prosecution or defendant within reasonable limits; and this course has been sanctioned by the court (a). Peremptory challenge.

The defendant may peremptorily challenge to the number of thirty-five in treason, except in that treason which consists of compassing the Queen's death by a direct attempt against her life or person (b). In such excepted case, in murder, and all other felonies, the number is limited to twenty (c). If challenges are made beyond the number allowed, those above the number are entirely void, and the trial proceeds as if no such extra challenge had been made (d). Number of peremptory challenges.

The court itself has power to amend or enlarge the panel where such a course is necessary (e).

If a sufficient number of jurors do not appear, or if by means of challenges and exemptions a sufficient number of unexceptionable jurymen do not remain, either side may pray a *tales*, that is, a supply of such men as are required to make up the deficiency (generally from the bystanders, *tales de circumstantibus*); but this course seems to require a warrant from the attorney-general (f). The usual course, however, at the assizes, is for the

(a) Arch. 172.

(b) 39 & 40 Geo. 3, c. 93, which provides that the offender shall be tried in the same manner as if charged with murder.

(c) 6 Geo. 4, c. 50, s. 29.

(d) 7 & 8 Geo. 4, c. 28, s. 3.

(e) 6 Geo. 4, c. 50, s. 20.

(f) 2 Hawk. c. 41, s. 18; 4 Bl. 355; Arch. 178.

judge to order the sheriff to return a new panel *instantly*, without further precept; and at sessions, for the justices to issue a special precept commanding the sheriff to return a sufficient number of jurors immediately (a).

Conduct of the jury.

When the jury have once been sworn they cannot leave the box without the leave of the court, and then only in company with some officer of the court. If, in consequence of being unable at once to come to a conclusion, they obtain leave to withdraw in order to consider their verdict, they are kept apart from every one, under the charge of an officer, who is sworn not to speak to them (except to ask them whether they have agreed), or suffer any one else to do so. By leave of the court they may have the use of fire, when out of court, and reasonable refreshment, procured at their own expense (b). Until recently, upon a trial for any felony, the jury were not allowed to separate until the trial was concluded, and if it was adjourned they remained in the custody of the sheriff or his officer. This is still the law in cases of treason, treason-felony, or murder, but it is now provided that upon a trial for any other felony the court may, if it see fit, at any time before the jury consider their verdict, permit them to separate in the same way as upon a trial for a misdemeanor (c). If during the trial, before verdict is given, one of the jury dies, or is taken so ill that he is not able to proceed with the trial, or without permission leaves the box (d), the jury is discharged and a new one sworn to try the case. Of course in such an event the remaining eleven may, and most frequently will, be in the new jury.

Special juries.

We have been hitherto referring to *common* juries. But as in civil, so in criminal cases, *special* juries are sometimes summoned. But this is only in misdemeanors, where the record is in the Queen's Bench Division, and only by permission of the court on motion of either the

(a) Arch. 178.

(c) 60 & 61 Vict. c. 18.

(b) v. 33 & 34 Vict. c. 77, s. 23.

(d) *R. v. Ward*, 10 Cox, 573.

prosecutor or the defendant; and there is no power in the court to order a special jury for the trial of a person charged with felony (a). The party applying for a special jury must pay the extra fees and expenses, and he will not be allowed these fees on a taxation of costs unless the court certifies that it was a proper case to be tried by a special jury. The property qualification of these jurors is higher than that of common jurors (b).

Another exceptional form of jury was formerly sometimes demanded; a *jury de medietate linguæ*. Formerly ^{*Jury de medietate linguæ.*} in cases of felony or misdemeanor, but not of treason, an alien might claim his right to be tried by a jury, half of whose number were aliens, or, at least, if not half, as many as the town or place could furnish. But this privilege was taken away by the Naturalisation Act, 1870 (c); and now an alien is tried as if he were a natural born subject.

(a) 6 Geo. 4, c. 50, s. 30.

(b) 33 & 34 Vict. c. 77, s. 6.

(c) *Ibid.* c. 14, s. 5.

CHAPTER XIV.

THE TRIAL.

Swearing the jury.

THE full complement of jurors having been obtained, they are sworn; or, if any of them, either on conscientious grounds or as having no religious belief, object to the oath, they make the statutory declaration or they may, if they please, take the oath with uplifted hand in the Scotch manner (a). The oath and mode of taking it differ slightly in felonies and in misdemeanors. In felonies, each juror is sworn separately in the following terms: "*You shall well and truly try, and true deliverance make, between our sovereign lady the Queen and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God.*" In misdemeanors, four take hold of the book at the same time, and four, or sometimes all, are sworn together. The oath is: "*You shall well and truly try the issue joined between our sovereign lady the Queen and the defendant, and a true verdict give according to the evidence. So help you God*" (b).

Proceedings at the hearing.

After the jury are sworn, in cases of treason or felony, the crier at the assizes makes the following proclamation: "*If any one can inform my lords the Queen's justices, the Queen's attorney-general, or the Queen's serjeant, ere this inquest taken between our sovereign lady the Queen, and the prisoners at the bar, of any treason, murder, felony, or*

(a) 51 & 52 Vict. c. 46.

(b) v. Fitz. St. (1st edition), p. 57, as to the historical cause of this distinction, the terms of the oath in a misdemeanor showing the resemblance of procedure for a misdemeanor to that in a civil action; that in felony reminding us of the days "when the jury were both judges and witnesses, who reported on the prisoner's guilt or innocence of their own knowledge."

misdemeanor, committed or done by them, or any of them, let him come forth, and he shall be heard ; for the prisoners stand at the bar upon their deliverance." It is usual also to formally call upon prosecutors and witnesses to come forward and give their evidence upon pain of forfeiting their recognizances. The clerk of arraigns or of the peace, having called the prisoner to the bar, says to the jury : "*Gentlemen of the jury, the prisoner stands indicted by the name of John Styles, for that he on the* (reciting the substance of the indictment). *Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty ; your charge, therefore, is to inquire whether he be guilty or not guilty, and to hearken to the evidence."* In misdemeanors, the jury are not thus charged. The counsel for the prosecution now opens the case to the jury, stating the principal facts which the prosecution intend to prove. He then calls his witnesses ; who, having been sworn, are examined by him, and then subjected to cross-examination by the prisoner or his counsel. The counsel for the prosecution may re-examine on matters referred to in the cross-examination. The court also may, at any time, interpose, and ask questions of the witnesses. After the case for the prosecution is closed, it is ascertained whether the defence intend to call any witnesses. If it is intended to call for the defence the person accused as a witness but no other witness as to the facts, the defendant then gives his evidence (a), and then, or at the close of the evidence for the prosecution if no evidence at all as to the facts is given for the defence, the counsel for the prosecution may, in case the prisoner is defended by counsel, but not otherwise, address the jury a second time in support of his case, for the purpose of summing up the evidence against the prisoner (b). He must, however, in this speech or in his final reply, if he

Course of
examination,
&c.

(a) 61 & 62 Vict. c. 36, s. 2. As to the examination of the person accused and his wife v. p. 391 *et seq.* The Act is printed at p. 499. Although the prisoner only gives evidence, counsel for the prosecution is permitted, in summing up his own evidence, to comment also upon that given by the prisoner. *R. v. Gardner*, Times, L. R. Nov. 7, 1898.

(b) 28 & 29 Vict. c. 18, s. 2.

has one, be careful to observe a rule which has recently been introduced, viz., that if the defendant has not given evidence on oath or has not called his wife as a witness, his failure to do so must not be made the subject of any comment by counsel for the prosecution (*a*). If the prisoner has witnesses whom he wishes to call, in addition to giving his own evidence, his counsel opens the case for the defence, and calls these witnesses in support thereof. They also are subject to cross-examination by the counsel for the prosecution, and re-examination by the counsel for the defence on this cross-examination. The counsel for the prisoner is now entitled, at the close of the examination of his witnesses, to sum up his evidence (*b*).

Reply.

After this address by the counsel for the defence, the counsel for the prosecution has the right of reply in cases where evidence, written or parol, has been adduced in defence. This does not however apply where the only witness called for the defence is the person who is upon his trial, as in such a case the prosecuting counsel has no right of reply after the prisoner's counsel has addressed the jury (*c*); moreover where the only additional evidence called for the prisoner is as to his character, the right of reply is never exercised. If no evidence has been adduced for the prisoner other than his own evidence, the address of the counsel for the defence is the last. There is, however, one exception. In those Crown cases in which the Attorney-General or Solicitor-General is personally engaged, a reply, where no witnesses have been called for the defence, is allowed as of right to the counsel for the Crown (*d*). If two prisoners are jointly indicted for the same offence, and only one calls witnesses, the counsel for the prosecution has the right to reply generally; but this is *summum jus*, and ought to be exercised with great forbearance, and if the offences are really separate, the

(*a*) 61 & 62 Vict. c. 36, s. 1 (*b*).

(*b*) 28 & 29 Vict. c. 18, s. 2.

(*c*) 61 & 62 Vict. c. 36, s. 3.

(*d*) See the resolution of the judges in Dec. 1884; 5 State Trials, New Series, p. 3, note c.

prosecuting counsel can only reply on the case of the party who has called witnesses (*a*). If the prisoner is not defended by counsel, he may cross-examine the witnesses for the prosecution and examine his own witnesses; and, at the end of such examination, address the jury in his own defence, either upon oath or not, as he may prefer. And if one only of two prisoners jointly indicted is defended by counsel, the undefended one may cross-examine and examine as above, and make his statement to the jury before or after the address of the counsel for the other, as the court thinks fit. If the prisoners jointly indicted are defended by different counsel, each counsel cross-examines, and addresses the jury in order of seniority at the bar; or, if the judge thinks desirable, in the order of the names of the prisoners on the indictment (*b*). If a prisoner defended by counsel wishes to address the jury and examine and cross-examine witnesses, he may do so; and his counsel may argue points of law, and suggest questions to him in cross-examination; but he cannot, as a matter of right, have counsel to examine and cross-examine witnesses, and reserve to himself the right of addressing the jury (*c*), otherwise than as a witness from the witness-box.

Nevertheless he has sometimes been allowed to do so. In some cases the prisoner, though represented by counsel, has been unconditionally allowed to make a statement (*d*). It must however be observed that these cases occurred before the passing of the Act which now enables every person charged with an offence to give evidence on his own behalf (*e*), and it is doubtful whether a judge would now permit a prisoner defended by counsel to make any

Statement by
the prisoner.

(*a*) *R. v. Jordan*, 9 C. & P. 118; v. also *R. v. Trevelli*, 15 Cox, 289; and Arch. 183.

(*b*) Arch. 181.

(*c*) *R. v. White*, 3 Camp. 97.

(*d*) *R. v. Manzano*, 2 F. & F. 64; *R. v. Doherty*, 16 Cox, 306; Warb. L. C. 260.

(*e*) 61 & 62 Vict. c. 36. Sec. 1 (*h*) of this Act preserves "any right of the person charged to make a statement without being sworn," but it is conceived that this can only apply when the prisoner is not defended by counsel. Allowing a prisoner defended by counsel to address the jury has usually been considered a matter of indulgence rather than the exercise of a right.

address or statement to the jury except as a witness, and his statement would then of course be subject to cross-examination. As to the practice of allowing counsel defending a prisoner to make, in his address to the jury, a statement of facts not intended to be proved, it has varied. In one case counsel was not allowed to do so, without giving the prosecution the right to reply (*a*). In another and more recent case Lord Chief Justice Cockburn allowed the prisoner's counsel to do so without any such condition, observing that the prisoner's counsel stood in the place of the prisoner, and was entitled to say anything which the prisoner might say, for which he would be entitled to consideration and credence if consistent with the rest of the evidence (*b*). With a view to settle the practice on this point, a meeting of the judges was held on the 26th November, 1881, and the following resolution was come to, viz.: "That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence" (*c*). Whatever hardship this rule may have sometimes inflicted when prisoners were unable to give evidence on their own behalf there can be none now that they may give such evidence in all cases.

Order of proceedings at the trial.

It will simplify matters if we tabulate the steps in the various cases which may occur.

i. *The prisoner defended by counsel, and adducing evidence in defence in addition to his own evidence.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses, who may be then cross-examined and re-examined.

(*a*) *R. v. Butcher*, 2 Mood. & Rob. 228 (per Coleridge, J.).

(*b*) *R. v. Weston*, 14 Cox, 346.

(*c*) *v. Arch.* 182.

Counsel for defence opens his case.

Counsel for defence examines the prisoner (if he is called) and his other witnesses, who may be then cross-examined and re-examined.

Counsel for defence sums up his case.

Counsel for prosecution replies.

ii. *Prisoner defended by counsel, but not adducing evidence except his own evidence.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses.

Prisoner (if he desires to do so) gives his evidence.

Counsel for prosecution sums up his case (a).

Counsel for defence addresses the jury.

iii. *Prisoner not defended by counsel, but calling witnesses.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses.

Prisoner gives his own evidence (if he wishes to do so) and examines his witnesses.

Prisoner addresses the jury.

Counsel for prosecution replies.

iv. *Prisoner not defended by counsel, and not calling witnesses.*

Counsel for prosecution opens his case.

Counsel for prosecution examines his witnesses.

Prisoner gives his own evidence on oath (if he so desires) and addresses the jury.

(a) v. p. 385.

The summing-up.

The only other proceeding before the jury consider their verdict is the summing-up by the judge, or, at the sessions, by the chairman or recorder. The object of this is to explain the law as applicable to the case under trial, and to marshal the evidence so that it may be more readily understood and remembered by the jury. He first states to them the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next refers to the evidence which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given on the part of the defendant; and he usually concludes by telling the jury that, if upon considering the whole of the evidence they entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt and acquit him.

CHAPTER XV.

THE WITNESSES.

FORMERLY many classes of persons were excluded on various grounds as incompetent to give evidence, the principal objections being that the proposed witness had a personal interest in the result of the trial or was himself, by reason of his having been convicted of serious crime, unworthy of belief, or, as it was called, an "infamous" person. But these objections to the testimony of a witness now operate in another way. Instead of excluding it altogether, the objection weakens the testimony and prevents the jury from placing ordinary credit in it; at the same time giving them the opportunity of gathering therefrom as much truth as possible. Thus it has been provided by statute that no person offered as a witness shall be excluded by reason of incapacity from *crime* or *interest* from giving evidence (a). However, even now a person under sentence of death is incapable of giving evidence (b).

It is a general principle of English law (which must now, however, be taken with a considerable qualification) that no one is bound to criminate himself (*nemo tenetur prodere seipsum*). Upon this principle it was for a great many years and until very recently held that as a general rule an accused person and his or her husband or wife could not be examined as witnesses either for the prosecution or the defence. To this general rule a considerable number of exceptions were in recent years made by various Statutes which it is now unnecessary to mention; but there were other exceptions (so far as regarded the

Grounds of
incompetency
now reduced.

Accused per-
son and his
or her consort
formerly in-
competent
witnesses.

(a) 6 & 7 Vict. c. 85, s. 1.

(b) *R. v. Webb*, 11 Cox, 133.

husband or wife) which existed at common law, and to these we shall afterwards have to refer. Although the law on this subject has been revolutionized by the Criminal Evidence Act 1898 (*a*), which enables an accused person and his consort to give evidence, they are nevertheless not placed entirely upon the footing of ordinary witnesses, but there are many special provisions with regard to their evidence and the mode in which it is to be taken which require the closest attention.

We propose to consider the matter from two points of view :—Firstly, as to how far, if at all, the evidence of the accused or his consort may be obtained on behalf of the *prosecution*, and secondly under what restrictions it may be given on behalf of the *defence*.

As witnesses
for the pro-
secution.

The accused.

Firstly. In one important respect the Criminal Evidence Act 1898 effects no alteration in the existing law. It does not (with the one exception referred to below) enable the prosecution in any criminal case to call the accused person himself as a witness. If he chooses to avail himself of his right to give evidence on his own behalf, to which we shall presently refer, he may do so, and he thereby exposes himself to be cross-examined by Counsel for the prosecution, but unless he voluntarily tenders himself as a witness for the defence he cannot be put upon his oath, nor can the prosecuting Counsel nor the Court ask him any question whatever beyond calling upon him to plead guilty or not guilty to the indictment. The Act, indeed, expressly provides that he shall not be called as a witness except upon his own application (*b*). To this rule there is but one exception, which arises under the Evidence Act 1877 (*c*), a Statute which is not affected in any way by the Criminal Evidence Act 1898 (*d*). The Evidence Act 1877 provides that on the trial of any indictment or other proceeding for the non-repair of or nuisance to any public

(*a*) 61 & 62 Vict. c. 36. This Act came into force on the 12th October, 1898; a copy of it will be found at p. 499. (*b*) 61 & 62 Vict. c. 36, s. 1 (*a*).
(*c*) 40 & 41 Vict. c. 14. (*d*) 61 & 62 Vict. c. 36, s. 6.

highway or bridge, or for a nuisance to a river, or of any indictment or proceeding instituted for the purpose of enforcing a civil right only, *the defendant* and the wife or husband of such defendant shall not only be admissible witnesses but shall be *compellable* to give evidence.

The husband or wife of the accused can, however, in several cases be called as a witness for the prosecution and compelled to give evidence.

- (a) Nothing in the Criminal Evidence Act affects a case where the wife (and in speaking here of the wife we include the husband in a case where a woman is defendant) might *at common law* be called as a witness without the consent of the accused (a). There are two such cases. The first is treason, in which it is said the husband or wife may testify against each other (b). The second is where the husband is indicted for a personal injury to his wife. The accused's consort.
- (b) The Criminal Evidence Act 1898 provides (c) that where the accused is charged with an offence against certain Statutes his wife may without his consent be called as a witness for the prosecution. These cases are the following:—(1) Neglecting to maintain or deserting his wife or any of his family (d), (2) rape, indecent assault, and abduction of women or girls (e), (3) a prosecution of the husband by the wife under the Married Women's Property Act 1882 (f) for a criminal dealing with her separate property and *vice versa*; (4) all cases falling under the Criminal Law Amendment Act 1885 (g); and (5) all cases under the Prevention of Cruelty to Children Act 1894 (h).

(a) 61 & 62 Vict. c. 36, s. 4 (2).

(b) *v. Rosc.*, 127; *R. v. Griggs*, T. Raym. 1 (an *obiter dictum*).

(c) 61 & 62 Vict. c. 36, s. 4 (1).

(d) 5 Geo. IV. c. 83.

(e) 24 & 25 Vict. c. 100, ss. 48 to 55.

(f) 45 & 46 Vict. c. 75, ss. 12, 16. As to these offences, *v. p.* 206.

(g) 48 & 49 Vict. c. 69, *v. pp.* 166–169.

(h) 57 & 58 Vict. c. 41, *v. p.* 186.

In all the above-mentioned cases therefore the wife of the accused can be called as a witness for the prosecution. But except as above stated, and in cases which fall under the Evidence Act, 1877, which we have already referred to, the wife cannot be called as a witness for the prosecution upon the trial of her husband upon a criminal charge (*a*).

As witnesses
for the de-
fence.

Secondly. It is, however, in enabling the accused and his wife to give evidence for the *defence* in all cases that the greatest alteration in the pre-existing law has been made by the Criminal Evidence Act, 1898.

That Act (*b*) provides that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings (*c*), whether the person so charged is charged solely or jointly with any other person. The Act contains certain provisions, however, as to the way in which such evidence is to be taken, which it is necessary to notice.

Evidence of
accused.

I. As to the evidence of the accused it is provided as follows :—

- (a) He shall not be called as a witness except upon his own application (*d*).
- (b) He may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged (*e*).
- (c) He must not be asked any question tending to show that he has committed or been convicted

(a) 61 & 62 Vict. c. 36, s. 1 (c).

(b) *Ibid.* s. 1. This Act does not extend to Ireland.

(c) But not before the grand jury. *R. v. Rhodes*, Times L. R. 14 Nov. 1898.

(d) 61 & 62 Vict. c. 36, s. 1 (a).

(e) *Ibid.* s. 1 (e). It should be noticed that this and the following provision are to a great extent the reverse of the rule with regard to the cross-examination of an ordinary witness. An ordinary witness cannot be required to answer a question the answer to which would tend to criminate him, but he may be asked whether he has been convicted of any offence, v. pp. 402, 403.

of or charged with any offence other than that wherewith he is then charged, or that he is of bad character, unless :—

- (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence for which he is being tried (*a*); or
 - (ii) he or his advocate has cross-examined the witnesses for the prosecution with a view to show that he has a good character, or has given evidence of good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or
 - (iii) he has given evidence against any other person charged with the same offence (*b*).
- (d) If he is the *only* witness to the facts to be called for the defence he is to give his evidence immediately after the close of the evidence for the prosecution (*c*) ; not after his counsel has addressed the jury, as is the case with ordinary witnesses ;
- (e) The fact that the accused has given evidence will not of itself entitle counsel for the prosecution to *reply* (*d*). But counsel for the prosecution will have a right to sum up the evidence after the accused has given his evidence, and the accused or his counsel will then make the last address to the jury.

(*a*) As in the case of receiving stolen goods, v. p. 222.

(*b*) 61 & 62 Vict. c. 36, s. 1 (*f*).

(*c*) *Ibid.* s. 2.

(*d*) *Ibid.* s. 3.

Evidence of
wife or hus-
band of
accused.

II. Evidence of wife or husband of accused,

As we have already pointed out, the husband or wife of the accused may now give evidence for the defence at every stage of the proceedings. This evidence is given in the same way and subject generally to the same rules as that of any ordinary witness, but it must be observed that nothing in the Criminal Evidence Act 1898 is to make a husband or wife compellable to disclose any communication made to him or her by the consort during the marriage (*a*). This last provision will equally apply whether the witness under examination is the accused or the husband or wife of the accused.

There is one important provision of the Act to which we may call attention here. The accused person is not to be driven by the fear of adverse comment to give evidence, or to call his wife as a witness, if he thinks it better for himself not to do so. It is expressly provided that the failure of any person charged with an offence, or of the wife or husband of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution (*b*).

Fellow-
prisoner can-
not be called
as witness.

Defendants *jointly* indicted and given in charge to the jury, and being tried together, cannot be called as witnesses against each other (*c*). But, as we have seen (*d*), the course is sometimes adopted of abandoning the prosecution against one of the co-defendants, in order to make him a witness for the prosecution, and the other defendants cannot object to this (*e*). And a defendant

(*a*) 61 & 62 Vict. c. 36, s. 1 (*d*). The rule is the same in civil proceedings, v. 16 & 17 Vict. c. 83, s. 3.

(*b*) 61 & 62 Vict. c. 36, s. 1 (*b*). The judge, however, may make such comment. *R. v. Rhodes*, Times, L. R. 14 Nov. 1898.

(*c*) Arch. p. 320. It is not, however, certain that this rule will not now be modified in a case where one defendant, whose evidence it is desired to obtain for the prosecution, himself applies or consents to be called as a witness for the prosecution. The old rule was based upon the fact that it was a distinguishing feature of our criminal system that a prisoner on his trial could neither be examined nor cross-examined, a principle which as we have stated has now been considerably modified, v. *R. v. Payne*, L. R. 1 C. C. R. at p. 355.

(*d*) v. p. 363.

(*e*) *R. v. Rowland*, Ry. & M. 401.

jointly indicted with another can now give evidence on his own behalf, even though that evidence may tell against his co-defendant (a).

As to incompetency from want of understanding.

Generally the same rules which serve to render a person incapable of committing a crime apply to exclude a person from being a witness. Thus an idiot or a lunatic, unless in an interval of sanity, is incompetent, unless the judge is of opinion that he is able to understand the nature and sanction of an oath and is of sufficient intelligence to be able to give evidence (b). Persons deaf and dumb, or dumb only, may give evidence through an interpreter, or in writing if they are able to write (c).

Incompetency of idiots.

As to children, the rule is somewhat different from that which prevails when the question is whether the child is responsible for its acts. An infant under the age of seven is incapable of committing a crime, but it is competent to give evidence at any age, if it satisfies the test, namely, if it has sufficient intelligence to understand the nature and obligation of an oath (d). The judge frequently, before allowing a child to be sworn, questions it as to its belief in God, knowledge of the consequences of telling a lie, &c. Juries are, however, often cautioned not to give too great weight to the evidence of young children.

Children.

As to incompetency on account of the relationship of legal adviser.

Counsel, solicitors, and their agents are not obliged, nor are they allowed without the consent of their clients, to give evidence of communications, written or parol, made to them by their clients in their pro-

Incompetency of legal adviser.

(a) 61 & 62 Vict. c. 36, s. 1.

(b) *R. v. Hill*, 2 Den. 254, 20 L. J. (M.C.) 222.

(c) *Morrison v. Lennard*, 3 C. & P. 127, 2 Tayl. Ev. 897.

(d) As to the exceptions to this rule created by the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1894, v. pp. 169, 317.

fessional capacity. And it is not material whether the communications were made in the case under trial or not, nor whether the client be a party to the cause. But they may be witnesses on points which do not come within the sphere of professional confidential communications; for example, to prove their client's handwriting or his identity. This privilege does not apply to a medical attendant, a conveyancer, a priest (a), nor indeed to any others than those mentioned above.

The privilege attaching to communications made by a person to a solicitor in his professional capacity does not extend to communications so made in furtherance of any criminal or fraudulent purpose. When upon the trial of such person the solicitor is called upon to disclose what passed between him and the accused person at the professional consultation, the court must, upon the special facts of each particular case, judge of the admissibility of the proposed evidence. Although the question of the consultation being held before or after the commission of the offence is not decisive, the court must in each case determine, upon the facts given, or proposed to be given in evidence, whether it seems probable that the accused consulted the solicitor, not after the commission of the crime, for the legitimate purpose of being defended, but before the commission of the crime, for the purpose of being guided and helped in it (b).

Certain facts
not disclosed.

In some cases the Court will not compel or allow the disclosure of a particular fact, if such disclosure may be of detriment to the public service, and does not bear directly upon the matter in question; for example,

(a) But it is at least very doubtful whether a sacramental confession made to a priest is not privileged, and it is improbable that any judge would now attempt to compel a priest to disclose statements so made to him. *Best*, C. J., expressly refused to do so, *Broad v. Pitt*, 3 C. & P. 519; see also an interesting note on this subject to *R. v. Hay*, 2 F. & F. 4.

(b) *R. v. Cox*, L. R. 14 Q. B. D. 153; 54 L. J. (M.C.) 41; 52 L. T. (N.S.) 25; 33 W. R. 396; 15 Cox, 611.

evidence disclosing the channels through which information reaches the Government or the police (a).

As to a witness's want of religious belief.

Formerly a person who was wholly without religious belief could not be a witness. But now this incompetency has been done away with, and it is provided generally with regard to oaths taken for all purposes where an oath is required by law, that every person who objects to be sworn, and states as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation in the form prescribed by the Act instead of taking an oath (b). Nor, if an oath is taken, is the fact that the person taking it had no religious belief any objection to the validity of the oath (c). Any person who, having made the affirmation provided by this statute, wilfully and corruptly gives false evidence, is liable to be indicted, and convicted as if he had taken an oath. But a witness cannot ask to affirm unless he states either that he has no religious belief, or that he has conscientious objections to take the oath as being against his religion, and if a witness objects to take the oath it is the duty of the presiding judge to ascertain whether the form of his objection entitles him to do so (d).

The form of oath varies according to the creed of the witness. In an ordinary case, the witness is thus addressed by an officer of the court:—"The evidence you shall give to the court and jury sworn between our sovereign lady the Queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God." He then kisses the Gospels. But the deponent may if he desires be sworn in the Scotch form, which is with uplifted hand and without kissing the book (e). Jews are

(a) *v. Hardy's Case*, 24 How. St. Tr. 753.

(b) 51 & 52 Vict. c. 46, s. 1.

(c) *Ibid.* s. 3.

(d) *R. v. Moore*, 61 L. J. (M.C.) 80; 66 L. T. 125.

(e) 51 & 52 Vict. c. 46, s. 5.

sworn on the Pentateuch, keeping their hats on, the oath concluding with "So help you Jehovah." In the case of others, the form which they consider binding is resorted to (*a*).

Objection to competency, when made.

The objection to the competency of a witness should be made before he has been examined in chief, unless, of course, the incompetency appears only on examination.

If it is intended to call at the trial witnesses for the prosecution who were not examined before the magistrates, notice should always be given to the prisoner. Such evidence could not be rejected if the notice were not given, but the absence of notice is always a subject of strong comment (*b*).

CREDIBILITY OF WITNESSES.

Elements determining the credibility of witnesses.

As we have already seen, instead of altogether excluding a witness on account of some supposed bias, the course generally adopted is to admit his evidence, allowing the circumstances causing suspicion to affect his credibility. It is for the jury to form their opinion of the credit due to a witness, as on any other fact. "The credibility of a witness is compounded of his knowledge of the facts he testifies, his disinterestedness, his integrity, his veracity, and his being bound to speak the truth by such an oath as he deems obligatory. Proportioned to these is the degree of credit his testimony deserves from the court and jury" (*c*). It is chiefly to these points that cross-examination is directed.

Knowledge of witnesses.

As to *knowledge*.—It will be important to consider on what the witness bases his conclusion; what opportunities he had of observation; what were the surrounding circumstances, whether they were such as to conduce to

(*a*) For examples, v. Arch. 335.

(*b*) *R. v. Greenslade*, 11 Cox, C. C. 412.

(*c*) Arch. 327.

a correct opinion ; for example, whether it was light or dark, &c.

As to *disinterestedness*.—Here should be considered the relationship of the prisoner and witness, natural or otherwise ; the advantage or disadvantage that would accrue to the witness on the prisoner's conviction ; prejudices, quarrels, &c. (a). Disinterested-
ness of
witnesses.

As to *veracity*.—The chief mode in which the veracity of a witness is impeached is by showing that at some former time he has said or written, or, what is more damaging, sworn, something not agreeing with or opposed to that which he now swears. As to the manner in which he may thus be confronted with his former allegations, it is provided by statute, that if, on cross-examination, a witness does not admit having made an inconsistent former statement, proof may be given that he did make it ; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement (b). If the statement has been in writing, or reduced into writing, as in the case of depositions, he may be cross-examined as to it without the writing being shown to him ; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. But this does not prevent the judge from inspecting and making such use of the writing as he thinks proper (c). It should be observed that when a witness is cross-examined as to contradictory statements made by him before the magistrates, the cross-examining party is bound by the witness's answer if he should deny having made such statements, unless the Veracity of
witnesses.

(a) As to the evidence of accomplices, v. p. 405.

(b) 28 & 29 Vict. c. 18, s. 4.

(c) *Ibid.* s. 5.

written deposition is actually put in evidence to contradict him (a).

Character of
witnesses.

As to *general character*.—It has been noticed above that a person is a competent witness although he has been convicted of a crime; but of course that fact will carry weight with the jury. To weaken the testimony of a witness, he may be cross-examined as to his delinquencies, or other witnesses may be called to prove his generally bad reputation and that they themselves would not believe him on his oath (b). A witness may be asked questions with regard to alleged crimes or other improper conduct; but he is not compelled to answer them if such answer would tend to expose the witness, or the husband or wife of the witness, to a criminal charge, or to a penalty or forfeiture of any kind (c). In order to entitle a witness to the privilege of not answering a question, as tending to criminate him, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; moreover, the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency (d); but if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. But all other questions, if material to the issue and even perhaps if they merely go to the credit of the witness, must be answered, however strongly they may reflect on the witness's character (e). A denial of improper conduct by the witness is conclusive, and he cannot be contradicted by calling other witnesses, unless the fact be relevant to

(a) *R. v. Riley*, 4 F. & F. 964.

(b) *R. v. Brown*, L. R. 1 C. C. R. 70; 36 L. J. (M.C.) 59; Warb. L. C. 254; and see 2 Tayl. Ev. 971.

(c) *v. 2 Tayl. Ev. 960.*

(d) *R. v. Boyes*, 30 L. J. (Q. B.) 301; 5 L. T. (N.S.) 147; 1 B. & S. 511; 9 W. R. 690.

(e) 2 Tayl. Ev. 967, 968.

the issue (*a*). A witness may, however, be questioned as to whether he has been *convicted* of a felony or misdemeanor, and, if he does not admit it, the cross-examining party may prove the conviction; and a certificate of the indictment and conviction for such offence, signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, is, on proof of the identity of the person, sufficient evidence of such conviction (*b*). In order to show the general bad character of the witness, almost any question may be asked as to his past life. It is left to the discretion and good feeling of the bar not to exceed the limits required by the necessities of the case, by wantonly taking away a person's character. As has already been stated, witnesses may be called to show the general bad character of a witness. But they may not be examined as to any particular offences which are alleged against the witness (*c*). On the other hand, witnesses may be called to testify to the general good character of the witness, if that is questioned (*d*).

It must, however, be borne in mind that the observations in the above paragraph do not apply to a defendant giving evidence on his own behalf. He cannot refuse to answer any question on the ground that it would tend to criminate him as to the offence for which he is being tried, but on the other hand it is only under certain circumstances, to which we have already referred (*e*), that he can be questioned as to his character or previous conviction.

NUMBER OF WITNESSES.

In all cases, both before the grand jury and at the trial, one witness for the prosecution is sufficient, with the following exceptions :—

Cases where more than one witness is required.

(*a*) *Harris v. Tippet*, 2 Camp. 637.

(*b*) 28 Vict. c. 18, s. 6.

(*c*) 2 Tayl. Ev. 971.

(*d*) *R. v. Murphy*, 9 How. St. Tr. 724 ; 2 Tayl. Ev. 974.

(*e*) v. p. 394.

1. In *treason* or misprision of treason (except where the overt act alleged is the assassination of the sovereign, or any direct attempt against his or her life or person), two witnesses are required, unless the prisoner confesses. And both of the witnesses must testify to the same overt act of treason; or one of them to one overt act, and another to another overt act of the same species of treason (*a*). But collateral facts may be proved by one witness.

2. In *perjury* there should be two witnesses. Both need not necessarily directly contradict what the accused has sworn; it will suffice if the second corroborates in any material circumstance, by circumstantial evidence or otherwise, what the first has said. And it will even be sufficient if the assignment of perjury be directly proved by one witness, if he be strongly corroborated by written documents. The reason usually assigned for this exception is that otherwise there would only be oath against oath; but more probably the expediency of protecting witnesses, and thus furthering the ends of justice, is the true ground (*b*).

3. By the Criminal Law Amendment Act, 1885, no person is to be convicted of any offence under the second and third sections of that Act (which relate respectively to the offences of procuration, and the defilement of women by threats, fraud, &c.), upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused (*c*). The same Act, after enacting that any person who unlawfully and carnally knows any girl under the age of thirteen, shall be guilty of felony, provides that upon the hearing of such a charge the evidence of the girl may, if she be of tender years and does not understand the nature of an oath, be received, though not upon oath, subject to such evidence being corroborated by some

(*a*) 7 & 8 Wm. 3, c. 3, ss. 2, 4.

(*c*) 48 & 49 Vict. c. 69, ss. 2 & 3.

(*b*) Best, Ev. 541.

other material evidence in support of the charge, implicating the accused (a).

It will be convenient here to notice the evidence of accomplices. Naturally it is viewed with suspicion, inas-
much as, on the one hand, the accomplice may hope to gain favour and leniency by assisting the prosecution; on the other hand, he will often be anxious to shield his companions. In practice, though not in strict law, it is deemed essential that the evidence of the accomplice should be corroborated in some material part by other evidence, so that the jury may be led to presume that he has spoken the truth generally (b). This confirmatory evidence must be unimpeachable; so that the evidence of another accomplice or his wife will not suffice (c). And the confirmatory evidence should not be merely to the fact of the act having been committed, but should extend to the identification of the prisoner with the party concerned (d). But it is not necessary that he should be corroborated in every particular, provided there is a sufficient amount of confirmation to satisfy the jury (e). Moreover, the amount of corroboration required depends on the nature of the crime and the extent of the complicity of the witness in it; only a slight corroboration being necessary if the offence is merely of a legal character, as the non-repair of a highway, or one which does not involve any great degree of moral turpitude (f). The application of the rule as to the necessity for corroboration is left to the discretion of the judge; but although he will express his own opinion strongly to the jury, and, if necessary, in such a way as almost to amount to a direction to acquit, it would appear that he has no power actually to withdraw the case from the jury in the absence of such corroborative evidence as he may think

Evidence of accomplices.

(a) 48 & 49 Vict. c. 69, s. 4.

(b) *R. v. Gallagher*, 15 Cox, at p. 318.

(c) *R. v. Noakes*, 5 C. & P. 326; *R. v. Neal*, 7 C. & P. 168.

(d) *R. v. Farler*, 8 C. & P. 106.

(e) *R. v. Gallagher*, *supra*.

(f) *R. v. Hargrave*, 5 C. & P. 170; *R. v. Boyes*, 1 B. & S. at p. 322; 30 L. J. Q. B. 302.

desirable, nor can a verdict in such a case be set aside upon the ground that corroborative evidence was wanting (a).

Attendance of witnesses.

How is the *attendance of witnesses* procured? In both felonies and misdemeanors the witnesses examined before the committing magistrate are usually bound over by recognizance by him to appear at the trial and give evidence. If they do not appear, the recognizances may be estreated and the penalty levied. All other witnesses may be compelled to attend by *subpœna*. This may be issued either at the Crown Office in London, or by the clerk of assize, or clerk of the peace at sessions. A copy of the writ is served upon the witness personally, the original writ being shown to him, and the subpœna may be served in any part of the United Kingdom (b).

Evidence taken abroad.

The Merchant Shipping Act, 1894, contains a provision (c) by which, under certain circumstances, evidence taken abroad can be used upon a trial in England for a criminal offence. Whenever in the course of any legal proceeding the testimony of a witness is required, then, upon due proof that the witness cannot be found in the United Kingdom, any deposition that the witness may have previously made on oath relative to the same subject-matter before any magistrate in her Majesty's dominions, or any British Consular officer elsewhere, shall be admissible, provided that in criminal cases the deposition shall not be admissible unless it was made in the presence of the person accused, and the fact of it being made in his presence must be certified by the official before whom the deposition is made.

Production of documents by witnesses.

If a written instrument, required as evidence, is in the possession of some person, he is served with a *subpœna duces tecum*, ordering him to bring it with him to the trial. Unless he has some excuse, allowed to be valid by

(a) *R. v. Boyes*, supra; *R. v. Meunier*, L. R. (1894), 2 Q. B. at p. 418; *R. v. Stubbs*, Dears. C. C. 555; 25 L. J. (M.C.) 16; Warb. L. C. 12.

(b) 45 Geo. 3, c. 92, ss. 3, 4.

(c) 57 & 58 Vict. c. 60, s. 691.

the court, he must produce it at the trial. Such lawful excuses are the following: that the instrument will tend to criminate the person producing it or, if he be a solicitor, his client; that it is his title-deed (a).

In the event of the non-appearance of a witness in answer to a *subpœna*, he incurs certain penalties. If the writ has been sued out of the Crown Office, the Queen's Bench, upon application, will grant an attachment for the contempt of court. In other cases the proceedings must be by way of indictment (b). But to render a witness subject to these penalties, he must have been served personally a reasonable time before the trial. If his expenses have not been tendered, and he is so poor as not to be able to go to the place of trial, this will probably be allowed by the court as a sufficient excuse.

Consequences of not obeying the *subpœna*.

If the witness is in custody, the proceedings are different. If in criminal custody, a secretary of state, or any judge of the Queen's Bench Division, may, on application by affidavit, issue a warrant or order under his hand for bringing up such person to be examined as a witness (c); or his attendance may be secured by a writ of *habeas corpus ad testificandum*. If in civil custody, a writ of *hab. corp. ad test.* is obtained upon application to a judge in chambers, founded upon an affidavit stating that the person to be brought up is a material witness. If the evidence of a person in court is required, he is bound to give it, although he has not been subpoenaed.

Attendance of a witness who is in custody.

A witness, whether subpoenaed or bound over by recognizance or even if attending voluntarily (d), either to prosecute or give evidence, is privileged from arrest whilst attending the trial on every day of the assizes or sessions until the case is tried; also for a reasonable time

Witness's privilege from arrest.

(a) v. Arch. 325, 341.

(b) *Ibid.* p. 342.

(c) 16 & 17 Vict. c. 30, s. 9; Crown Office Rules, 1886, rr. 246, 247. 61 & 62 Vict. c. 41, s. 11.

(d) Arch. 342: *Meekins v. Smith*, 1 H. Bl. 636.

before and after trial whilst coming to or returning from the place of trial.

As we have seen, preventing a witness from attending or giving evidence is a contempt of court; and intimidating a witness from giving evidence for the prosecution is a misdemeanor (a).

Expenses of witnesses for the prosecution.

In felonies.

As to *witnesses' expenses*.—In *felonies*, the court may order the payment to the prosecutor and his witnesses of a reasonable sum for costs, expenses, trouble, and loss of time; and this whether the result of the trial be a conviction or acquittal, or no bill be found (b). And although no bill be preferred, a like reasonable sum may be ordered to be paid to those who *bond fide* attend the court in obedience to their recognizances or *sub-pœna*. The amount to be paid for the attendance before the examining magistrate must be ascertained by the certificate of the magistrate granted before the trial (c). Further, if a charge is made *bond fide* on reasonable and probable cause, although there has been no committal for trial, the magistrate before whom the accused was brought and examined may grant to any witness examined a certificate of his expenses (d).

In misdemeanors.

In very many cases of *misdemeanor* there is a like power of ordering payment of witnesses' expenses. The particular misdemeanors will be found mentioned in 7 Geo. 4, c. 64, s. 23; 14 & 15 Vict. c. 55, s. 2; and other statutes which deal with individual offences. Each of the Criminal Law Consolidation Acts provides that the court, before whom any indictable misdemeanor against such Act is prosecuted or tried, *may* allow the expenses of witnesses, as in felony; and in prosecutions by the

(a) v. p. 83.

(b) 7 Geo. 4, c. 64, ss. 22, 24, 25.

(c) *Ibid.* s. 22.

(d) 29 & 30 Vict. c. 52. This statute applies also to misdemeanors. It was originally a temporary statute and was renewed from time to time, but the effect of 56 Vict. c. 14, is to render it perpetual.

Treasury in coinage offences *shall* allow such expenses (a). There is, however, no power, either in cases of felony or misdemeanor, to allow these expenses where the indictment has been removed by certiorari into the Queen's Bench Division for trial (b).

In a similar manner, in certain indictable offences dealt with by the magistrates in the exercise of their summary jurisdiction, the magistrate may order the payment of witnesses' expenses (c).

So much as to witnesses for the prosecution. The court has, however, also discretionary power to order the payment of the expenses of *witnesses for the prisoner* who appear after having been bound by recognizance by the examining magistrate to give evidence (d). Expenses of witnesses for the defence.

In the event of a conviction for treason or felony, the court may order the prisoner to pay the whole or part of the costs of the trial; and in cases of assault the defendant, on conviction, may be made to pay the prosecutor's costs and a reasonable allowance for loss of time (e). It will be remembered that in cases under the Vexatious Indictments Act a prosecutor who has elected to be bound over to prosecute may, at the discretion of the court, be required to pay the defendant's costs on the acquittal of the latter (f); and also that, in private prosecutions for the publishing of a defamatory libel, if judgment is given for the defendant, he may recover costs from the prosecutor (g). Payment of costs by the defendant.

(a) 24 & 25 Vict. c. 96, s. 121; c. 97, s. 77; c. 98, s. 54; c. 99, s. 42; c. 100, s. 77; v. also Arch. 344.

(b) See cases cited in Short & Mellor's Cr. Off. Prac. 241, 453.

(c) 42 & 43 Vict. c. 49, s. 28.

(d) 30 & 31 Vict. c. 35, s. 5.

(e) 33 & 34 Vict. c. 23, s. 3; 24 & 25 Vict. c. 100, s. 74.

(f) v. p. 351.

(g) 6 & 7 Vict. c. 96, s. 8; v. p. 104.

CHAPTER XVI.

THE EXAMINATION OF WITNESSES.

THIS is a subject on which, though a wide latitude is allowed to counsel, some rules may be laid down as directly authorized, others as developed in and sanctioned by practice.

General course
of examination.

We have already noticed the general course of the examination of witnesses (a); namely, that the witnesses for the prosecution are first examined in chief by the counsel for the prosecution, and then cross-examined by the counsel for the defence; and after the case for the prosecution has closed, then the witnesses for the defence are examined by the counsel for the defence, and cross-examined by the counsel for the prosecution; in each case the witness being re-examined by the party calling him, if it is thought desirable. It should also be remembered that the court may at any time put such questions as it thinks fit to the witness, even after he has left the witness-box; and that if, after the counsel has finished his examination or cross-examination, he thinks of some other question which ought to have been asked, that question can be put only through or by leave of the court.

What witnesses should
be called.

It is usual for counsel for the prosecution to call all the witnesses whose names are on the back of the indictment, even though he may not wish to ask them any question; the object being to afford the defence an opportunity to cross-examine if they so desire. But in such a case the counsel for the prosecution may re-

(a) v. p. 385.

examine. Nevertheless a prosecutor is not in strictness bound to call every witness whose name is on the back of the indictment, although it is usual to do so (*a*); nor can a prosecutor be compelled to give an accused person the additions and places of residence of witnesses named on the back of the indictment (*b*).

When any collusion is suspected among the witnesses, or it is thought that any of them will be influenced by what they hear from counsel or other witnesses, those who have not yet been examined are ordered to leave the court until they are wanted, and after examination they are required to remain in court. The judge will do this, either at his own instance, or on the application of the opposite party. If the order be disobeyed, the witness may be punished as for his contempt; but, though the disobedience will be matter of remark for the jury, the judge has no right to reject his testimony (*c*).

Witnesses
ordered out of
court.

At the outset it will be well to ascertain the position of the counsel for the prosecution and for the defence respectively, their functions and conduct, their respective duties, and the spirit in which they should conduct them. It is needless to observe that it is not the object of the counsel for the prosecution to get a conviction at any price. It is his duty to see that the case against the prisoner is brought out in all its strength; but it is not his duty to conceal, or in any way diminish the importance of, its weak points, his function being to put forward, but with all possible candour and temperance, that part of the case which is unfavourable to the prisoner.

Functions, &c.,
of the counsel
for the pro-
secution;

On the other hand, the counsel for the prisoner has before him, as his object, the acquittal of the prisoner. His duty is to act as an advocate, and not to any extent

of the counsel
for the pri-
soner.

(*a*) *R. v. Simmonds*, 1 C. & P. 84; *R. v. Whitbread*, *ibid.* (n); *R. v. Taylor*, *ibid.* (n).

(*b*) *R. v. Gordon*, 12 L. J. (M.C.) 84; v. also Rosc. 129.

(*c*) *R. v. Colley*, Moo. & M. 329.

as a judge. He has to put himself in the place of the accused, and so is not under any obligations which the accused would not be under. Thus he is not obliged to divulge facts with which he may be acquainted which are unfavourable to the prisoner (a). Nevertheless he is not entitled to browbeat a witness, nor otherwise to treat him unfairly, nor to misstate the evidence to the jury.

Witness supposed to be favourable to the side calling him.

The rules as to examination-in-chief and cross-examination respectively are *generally* the same, whether the witness be for the prosecution or the defence. They are based upon the supposition that the witness called and presented by the party examining him is favourable to his side, and therefore unfavourable to his opponent.

Examination-in-chief. Questions must be relevant.

Examination-in-chief.—What questions may be put to a witness? In the first place, only such as are *relevant* to the matter in issue, the answers to which will tend to prove the offence or defence. Of course, if circumstantial evidence is resorted to, greater latitude will be allowed; inasmuch as it is not so easy to estimate the relevancy of the question.

Leading questions not allowed.

The second great rule is that *leading questions* may not be asked in examination-in-chief. A leading question is one which in any way suggests to the witness the answer which the person asking requires. Thus, to ask a witness, "Had the prisoner a white hat on?" would be a leading question; but the question, "What sort of a hat had the prisoner on?" would not be, unless, indeed, the point to be proved was whether he had or had not a hat on. It is often given as a test whether a question be leading or not, whether it might be answered by "Yes" or "No." But this test is by no means decisive; all questions which

(a) "The counsel for the Crown may not use arguments to prove the guilt of the prisoner which he does not himself believe to be just, and he is bound to warn the jury of objections which may diminish the weight of his arguments. In short, as far as regards his own evidence, his speech should as much as possible resemble the summing-up of the judge. The counsel for the prisoner may use arguments which he does not believe to be just. It is the business of the jury, after hearing the judge, to say whether or not they are just."—Fitz. St. 168 (1st edition).

may be thus answered not being leading, and other questions than those which may be so answered being equally leading. Thus the question, "Could the prisoner hear what he said?" is not leading. Though the rule is that leading questions may not be put in examination-in-chief, When leading questions may be asked. there are certain exceptions, some allowed as of right, others for the sake of convenience.

(a) For the purpose of identifying persons or things which have already been described, the attention of the witness may be directly pointed to them (a).

(b) When a witness is called to contradict another, who has sworn to a certain fact, he may be asked in direct terms whether that fact ever took place.

(c) When the witness is, in the opinion of the judge, hostile to the party calling him.

(d) When the witness is unable to answer general questions from an obviously defective memory, or the complicated nature of the matter as to which he is interrogated (b).

Leading questions are also not objected to—

(a) When merely introductory, so as to save time.

(b) When the particular matter is not disputed. Thus, where a witness having deposed to a fact has not been cross-examined on it, questions may be put which assume that fact.

A third general rule is, that the evidence of the witness must relate to what is immediately *within his knowledge and recollection*. But there is one exception to this rule. Witness must testify from his own knowledge. In matters of science, skill, travel, &c., the evidence of experts is allowed, that is, persons who have a special knowledge of the subject in question may be called to give their opinion as to the consequences, &c. of facts already proved. For example, if the wounds of a murdered person are described, a surgeon may be asked

(a) *R. v. Watson*, 2 Starkie, N. P. C. 128.

(b) Best, Ev. 578.

Refreshing
his memory.

his opinion as to whether they caused the death ; but, of course, it will be for the jury to determine how far they will adopt this opinion (a). In accordance with the general rule, a witness is not allowed to read his evidence. But he is allowed to *refresh* his memory by referring to any writing made or examined by himself soon after the event to which it refers (b), and a skilled witness called to give evidence on some scientific question may refresh his memory by referring to professional treatises, tables, or the like (c).

Contents of a
written docu-
ment, how
proved.

A fourth general rule is, that the *contents of a written document* cannot be proved orally if the document is capable of being produced, but must be proved by the document itself. If, however, it be shown that it is lost, destroyed, or in the possession of the prisoner, who has had notice to produce it, other evidence may be given of its contents (d).

Consequences
of witness
proving
hostile.

Another matter to be noticed is the possible *hostility* of one's own witness. It is a rule that a counsel cannot discredit his own witness, although he may, if he can, make out his case by other and contradictory evidence ; it is also, as we have seen, a rule that leading questions may not be put in examination-in-chief. But it is provided by statute (e) that although a party producing a witness is not allowed to impeach his credit by general evidence of bad character, he may, in case the witness, in the opinion of the judge, proves adverse (*i.e.*, hostile), contradict him by other evidence, or, by leave of the judge, prove that at other times he has made a statement inconsistent with his present testimony ; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. So, also, if, in the opinion of the judge, the witness is keeping back

(a) *R. v. Wright*, R. & R. 456.

(b) 2 Tayl. Ev. 922 *et seq.*

(d) *v. p.* 422.

(c) *Ibid.* 935.

(e) 28 & 29 Vict. c. 18, s. 3.

some of the truth, in order to favour the prisoner or otherwise, he may allow the examining counsel to ask leading questions, and generally *to treat the witness as hostile*.

It will be remembered that a witness is not compelled to answer questions which tend to criminate himself. By several statutes, though they are obliged to answer the questions, the evidence given by witnesses is expressly declared not available against them on a criminal charge, for example, under the Corrupt Practices Prevention Act (a). Witness not bound to criminate himself.

Cross-examination.—Inasmuch as a witness is supposed to be inclined to favour the party calling him, greater powers are given to the cross-examining counsel. He may ask leading questions, and in this way remind the witness of anything which may tend to help the cause of the opposite party. But if the witness proves anything favourable to the cross-examiner, the fact that the evidence was procured by leading questions may, of course, diminish its value. The counsel will not, however, be allowed to put into the witness's mouth the very words he is to echo back again (b). In cross-examination the questions will be of two classes: (a) Those which tend directly to refute or explain what has been given in evidence in the examination-in-chief; (b) Those whose object is to affect the credit of the witness. It is not usual to cross-examine witnesses to character except the counsel cross-examining has some distinct charge on which to cross-examine them (c). It is needless to add that a cross-examining counsel should avoid asking questions the answer to which, if unfavourable, would be conclusive against him. And he should remember that the story of the witness, if true, will often be confirmed the more he is questioned about it; and this although there may be slight discrepancies on immaterial points. Cross-examination.

(a) 46 & 47 Vict. c. 51, s. 59.

(b) *R. v. Hardy*, 24 How. St. Tr. 755.

(c) *R. v. Hodgkiss*, 7 C. & P. 298.

Re-examination.

Re-examination.—The object of the re-examination, if it be judged expedient to have recourse to it, is to inquire into and explain what has transpired on cross-examination. But it must be strictly confined to such matter; the re-examiner may not without the leave of the judge ask questions which he might and ought to have put on examination-in-chief.

Questions put through the judge.

Any further questions after re-examination must be put through the judge; also through him any questions which occur to counsel after they have finished their examination or cross-examination.

Objections to questions, how made.

If any improper question, *e.g.*, irrelevant or leading, be put in examination-in-chief, the counsel on the other side should immediately interpose and object to it before the witness has time to answer it, though in the case of a leading question this will often be ineffectual, inasmuch as the mischief has been done by the suggestion being made. Counsel in the same way should interpose if parol evidence is proposed to be given when a document should be produced.

CHAPTER XVII.

EVIDENCE.

“ EVIDENCE, in law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any fact the truth of which is submitted to judicial investigation ” (a). Definition of evidence.

In ascertaining the law on the subject of evidence in general, five heads present themselves under which may be ranged the chief principles which it is necessary to consider:—

1. On whom the burden of proof lies.
2. What must be proved, and what may not be proved.
3. The best evidence must always be given.
4. Hearsay is not evidence.
5. Confessions, under certain circumstances, are not admitted as evidence.

1. The *burden of proof* is on the prosecution as a rule. The prosecution must prove their case before the prisoner is called upon for his defence; and this although the offence alleged consists of an act of omission and not of commission, and therefore the prosecution have to resort to negative evidence (b). The law considers a man innocent until he is shown to be guilty. But the principle under discussion must not be understood with

The burden of proof, as a rule, on the prosecution.
Qualifications of the rule as to the *onus probandi*.

(a) 1 Tayl. Ev. 1.

(b) There is an exception to this rule when the accused pleads specially, e.g., *autrefois acquit*.

unlimited signification. Though the burden of proof of the charge is in general on the prosecution, yet on particular points it is on the prisoner. This is markedly the case in some offences. Thus, by various Acts of Parliament it is declared penal to do certain things, or possess certain articles, without lawful excuse or authority; such excuse or authority must be proved by the accused. For example, to possess public stores marked with the broad arrow (*a*); to possess coining tools (*b*). Again it lies on the defendant to prove that signals to smuggling vessels were not made for the purpose of giving illegal notice (*c*); also to show some justification for sending an unseaworthy ship to sea (*d*). So where a person is charged with making or having in his possession any explosive substance, under suspicious circumstances, the onus lies on him to show that he made it or had it in his possession for a lawful object (*e*). Again the onus lies on a defendant, who is accused of forging, &c., a trade mark, trade description, &c., to prove that he acted without intent to defraud (*f*); or if he be accused of selling, &c., goods, with any forged trade mark, description, &c., to prove that he took reasonable precautions and had no reason to suspect the genuineness of the mark, &c., gave the prosecutor all information in his power with respect to the persons from whom he obtained such goods, &c., and otherwise acted innocently (*g*). But it will be noticed that in all these cases there is something to be proved in the first instance by the prosecution—either the possession of the goods, the unseaworthiness of the ship, &c.

In some cases an explanation is expected from the prisoner.

And not only in the particular cases of which we have given examples, but in most cases of circumstantial evidence, "there is a point (though it is impossible to determine exactly where it lies) at which the prosecutor has done all that he can reasonably be expected to do,

(*a*) 38 & 39 Vict. c. 25.

(*c*) 39 & 40 Vict. c. 36, s. 190.

(*e*) 46 & 47 Vict. c. 3, s. 4 (1).

(*f*) 50 & 51 Vict. c. 28, s. 2 (1).

(*b*) 24 & 25 Vict. c. 99, s. 24.

(*d*) 57 & 58 Vict. c. 60, s. 457.

(*g*) *Ibid.* s. 2 (2).

and at which it is reasonable to ask for evidence from the prisoner in explanation, and to draw inferences unfavourable to him from its absence" (a). Thus in a case of murder by poisoning the court will naturally expect from the prisoner an explanation of the object for which poison was purchased if it is traced to his possession; so also in the case of recent possession of stolen goods. Killing is presumed to be murder until otherwise accounted for.

2. *What must be proved?* — All facts and circumstances stated in the indictment which cannot be rejected as surplusage; in other words, all the constituents of the offence. Though, as we shall see hereafter, if a more serious crime contains, as it were, a less serious one, the prisoner indicted for the former may sometimes be convicted of the latter, if the more serious circumstances cannot be established; thus on an indictment for murder, if the malice prepense be not proved, the prisoner may be convicted of manslaughter.

What must be proved?

We have seen above in what cases the time and place must be correctly stated in the indictment (b); and thus we now know when they must be correctly proved. But in any case the offence must be proved to have been committed within the extent of the court's jurisdiction. Any material variance between the fact laid in the indictment and the fact proved will be fatal, unless amended (c).

As to time and place.

Amendment of variance.

Closely connected with the question "What must be proved?" is the question "What may not be given in evidence?" As a rule, nothing must be given in evidence which does not directly tend to prove or disprove the matter in issue. The previous or subsequent bad character of the prisoner may not be proved; unless to rebut evidence of good character (d). Nor may it be

Facts, &c., which may not be given in evidence.

As to other offences.

(a) Fitz. St. 303 (1st edition).

(b) v. p. 327.

(c) v. p. 327.

(d) v. *R. v. Rowton*, 34 L. J. (M.C.) 57; L. T. (N.S.) 745; 11 Jur. (N.S.) 325; 13 W. R. 436.

proved that he has a general disposition to commit the particular kind of offence. Again, it is not allowable to prove a man guilty of one felony in order to prove him guilty of another unconnected with it. In other words, if the offences are distinct, evidence of one offence is, in general, inadmissible on the trial of the prisoner for another offence. But if they are connected, and form one entire transaction, other offences may be proved to show the character of the transaction. If the evidence is admissible on general grounds as being relevant, it cannot be excluded merely because it discloses other offences (a).

When evidence
of other
offences may
be given :
In treason.

There are exceptions to the rule excluding evidence of other offences :—

(a) In *treason*, other overt acts may be given in evidence, if they directly prove any overt acts which are laid in the indictment. And in conspiracy, sedition, libel, and similar offences, wide limits are given to the reception of evidence, inasmuch as the offence can only be estimated by the surrounding circumstances (b).

To prove
guilty know-
ledge.

(b) When it is necessary to prove the *guilty knowledge* of the defendant, evidence may be given of his having committed the same offence on other occasions. Thus, on an indictment for uttering forged bank notes, or for uttering counterfeit coin, evidence may be given of the defendant having at other times uttered or had in his possession other forged bank notes or counterfeit coin (c). So the guilty knowledge of the falsehood of a pretence may be shown by evidence of a previous obtaining or attempting to obtain by false pretences (d). Under the Prevention of Crimes Act, 1871, when proceedings are taken against a person for *receiving* or having in his possession stolen goods, evidence may be given at any

In cases of
receiving.

(a) Rosc. 85 ; v. *R. v. Salisbury*, 5 C. & P. 155.

(b) v. *R. v. Hunt*, 3 B. & Ald. 566 ; *R. v. Pierce*, Peake, 75.

(c) For a number of authorities as to these and similar cases v. *Arch.* 240.

(d) *R. v. Francis*, L. R. 2 C. C. R. 128 ; 43 L. J. (M.C.) 97 ; 30 L. T. (N.S.) 503 ; 22 W. R. 663 ; Warb. L. C. 176.

stage of the proceedings of the defendant having had in his possession other property stolen within the preceding twelve months. And after proof that the stolen goods have been found in his possession evidence may also be given of his previous conviction, within five years, of any offence involving fraud or dishonesty, provided in the latter case that seven days' notice in writing of the intention to adduce such evidence has been given to the accused (a). But evidence is not admissible to show that the prisoner within the preceding twelve months had been in possession of certain other property proved to have been stolen, but the possession of which he had parted with before the date of the larceny charged in the indictment (b).

(c) When it is necessary to prove *malice* or *intent* on the part of the defendant, evidence of other offences may, under some circumstances, be given. Thus, in a trial for murder, evidence of former unsuccessful attempts or threats to murder the same person, and even of the actual murder of other persons by the same means, has been admitted as being relevant to the question whether the prisoner's actions which have been otherwise proved against him have been wilful or accidental (c). To show intent.

As to evidence of *good character*.—Witnesses may be called to speak generally to the good character of the prisoner ; but may not give evidence of particular facts, as showing such good character, unless such evidence tends directly to the disproving of some of the facts in issue. The evidence must be to the general reputation for good character, and not to the witness's own opinion. The way in which the information is elicited is by questions of this sort : " How long have you known the prisoner ? " " During that time, what has been his general character for sobriety, honesty, and industry ? " Evidence of good character;

(a) 34 & 35 Vict. c. 112, s. 19, p. 221.

(b) *R. v. Carter*, L. R. 12, Q. B. D. 522 ; 32 W. R. 663 ; 15 Cox, 448 ; Warb. L. C. 197 ; approving of *R. v. Drage*, 14 Cox, 85.

(c) *R. v. Geering*, 18 L. J. (M.C.) 215, Warb. L. C. 103 ; *Makin v. Att.-Gen. for New South Wales*, L. R. (1894), App. Cas. 57 ; 63 L. J. (P.C.) 41 ; 69 L. T. 778 ; 58 J. P. 148 ; 17 Cox, C. C. 704.

of bad
character.

General evidence of good character may be disproved by general evidence of bad character; but not by particular cases of misconduct, although if he sets up his good character, the prisoner may be cross-examined on the subject (*a*), and previous convictions may as a rule be proved in cases where the prisoner calls witnesses to prove his good character or tries to establish a good character for himself by cross-examining the witnesses for the prosecution (*b*).

Best evidence
must be given.

3. The *best evidence* must always be given; that is, if it is possible to be had; if not, then inferior evidence will be admitted. But before this inferior (or *secondary*) evidence is let in, the absence of the better evidence must be accounted for. By this is meant that merely substitutionary evidence, that is, such as indicates that more original sources of information exist, must not be received so long as the original evidence is attainable.

The case of
written
documents.

The most common application of this rule is in the case of written instruments. It is plain that the best evidence of the contents of a written document is the writing itself, and therefore before a copy, or parol evidence of its contents, can be received, the absence of the original instrument must be accounted for by proving that it is lost or destroyed, or that it is in the possession of the opposite party, and that he has had reasonable notice to produce it (*c*). If once secondary evidence is admitted, any proof may be given, as there are no degrees of secondary evidence; thus, if an original deed cannot be produced, parol evidence of its contents may be given, although there is an attested copy in existence (*d*). But for the sake of convenience, duly certified or examined copies may be given in evidence of all records, other than those of the court requiring proof of them, of

(*a*) v. p. 395.

(*b*) 6 & 7 Wm. 4, c. 111; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37.

(*c*) 1 Tayl. Ev. pp. 301, 310.

(*d*) *Ibid.* p. 356. *Sugden v. Lord St. Leonard's*, L. R. 1 P. D. 154; 45 L. J. (P.) 1; 34 L. T. 369; 24 W. R. 479.

journals of either House of Parliament, and generally of the official documents of other courts, and parish registers, entries in corporation books and books of public companies relating to things public and general (a).

To avoid the inconvenience of the production in court of bankers' books, it has been provided that an examined copy of any entry in such a book shall be received as *prima facie* evidence of the entry and of the transactions therein recorded; but it must first be proved by a partner or officer of the bank, orally or by affidavit, that the book is one of the ordinary books of the bank and is still in its custody, that the entry was made in the usual course of business, and that the copy is a correct copy of the entry. The bank cannot be compelled to produce the original book without an order of a judge (b).

Entries in
bankers' books

4. *Hearsay is no evidence.*

Hearsay (*derivative* or *second-hand*, as opposed to *secondary*) evidence is that which is learnt from some one else, whether by word of mouth or otherwise; in other words, it is anything which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.

Hearsay no
evidence.

The reasons usually assigned for the rejection of hearsay evidence are two: (a) that the original statement or writing was not made on oath; (b) that the party affected has not the opportunity of cross-examining the originator of it. We have seen that secondary evidence can be given only where there has been an explanation of the absence of the best evidence; second-hand evidence cannot be given at all, subject to the following exceptions, which arise from necessity (c).

Hearsay, why
rejected.

When it may
be given in
evidence.

i. To prove a public custom (d); matters of

(a) 1 Tayl. Ev. pp. 309, 356.
(c) v. Arch. 256.

(b) 42 & 43 Vict. c. 11.
(d) 1 Tayl. Ev. 393.

pedigree (*a*); reputation on questions of public or general right, *e.g.*, to prove that a road or ferry is public (*b*).

ii. What a witness has been heard to say at another time may be given in evidence in order to invalidate or confirm his testimony given in court (*c*).

iii. Declarations or statements made by persons under the sensible conviction of their impending death, and who, at the time, are in actual danger of death (*d*). Such declarations are admitted only when the death of the deceased is the subject of the charge (that is, in cases of murder or manslaughter), and only if the declaration refers to the injury which is the cause of death (*e*). Moreover, if the deceased has expressed at the time of making the declaration any hope of recovery, however baseless that hope may have been, the declaration is inadmissible. There must be on the part of the person making the declaration an unqualified belief in the nearness of death or, as it has been expressed, "a settled hopeless expectation of immediate death," and before the evidence can be admitted, this belief must be shown by the prosecution to have existed (*f*). It has even been said that if the evidence shows that the deceased thought he would die *to-morrow*, the statement would not be admissible (*g*).

iv. Evidence of statements made by deceased persons, if against their pecuniary or proprietary interest (*h*); and statements or entries made by them in the ordinary course of their duty or employment, provided such statements or entries were made from their own personal knowledge, and at, or very shortly after, the time when the act occurred which is sought to be proved (*i*).

(*a*) 1 Tayl. Ev. 413.

(*c*) Arch. 256.

(*e*) *R. v. Mead*, 2 B. & C. 605.

(*f*) *R. v. Jenkins*, L. R. 1 C. C. R. 187; 38 L. J. (M.C.) 82; 20 L. T. 372; 17 W. R. 621; Warb. L. C. 266; *Woodstock's Case*, 1 Leach, 502; *R. v. Mitchell*, 17 Cox, 503.

(*g*) *R. v. Osman*, 15 Cox, 1.

(*i*) 1 Tayl. Ev. 453; Arch. 258.

(*b*) *Ibid.* 393.

(*d*) 1 Tayl. Ev. 464; Arch. 258.

(*h*) 1 Tayl. Ev. 434; Arch. 257.

v. When the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible as original evidence (*a*); for example, what was said to a surgeon immediately after an assault (*b*). But the *particulars* of a complaint so made have not as a rule been allowed to be asked in examination-in-chief. It has, however, now been settled that such evidence may be given in cases of rape and similar assaults upon women and girls, provided the complaint was made shortly after the occurrence took place; not, indeed, as evidence of the fact complained of, but as showing the good faith and credibility of the prosecutrix (*c*). Indeed, in a recent case of felonious wounding the Recorder of London expressed an opinion that the principle upon which such evidence was admitted now extended to all cases (*d*). In order, however, to render such evidence admissible, it is essential that the complaint should have been made speedily, and it has been held that a statement made the day after the alleged occurrence was too late, and that details of such a statement could not be given in evidence (*e*).

vi. When the sayings, &c., of another are part of the *res gestæ*, that is, of the general transaction, and are not merely a medium of proof of another fact. Thus, the cries of a person being stabbed, or of a riotous mob, are good evidence (*f*).

It will be convenient here to notice the rule that if a witness is dead, or too ill to travel (or kept out of the way, as against the person so keeping him out) (*g*), his depositions taken before the committing magistrate may be read, provided that such depositions were taken in the

Depositions of ill or deceased persons may be read at the trial.

(*a*) 1 Tayl. Ev. 374.

(*b*) *Aveson v. Lord Kinnaird*, 6 East, 198.

(*c*) *R. v. Lillyman*, L. R. [1896] 2 Q. B. 167; 65 L. J. (M.C.) 195; 74 L. T. 730; 44 W. R. 654; 60 J. P. 536; Warb. L. C. 133.

(*d*) *R. v. Folley*, 60 J. P. 569.

(*e*) *R. v. Rush*, 60 J. P. 777.

(*f*) *v. 21 How. St. Tr.* 514, 529; 1 Tayl. Ev. 376.

(*g*) *R. v. Scaife*, 2 Den. 281; 20 L. J. (M.C.) 229.

presence of the accused, and that he had an opportunity of cross-examining the witness (a). The death or illness of the witness whose deposition it is proposed to read, and the fact that the deposition was regularly taken in the presence of the accused person must be proved to the satisfaction of the judge at the trial (b).

In cross-examination the rule as to the non-admissibility of hearsay evidence is not strictly applied, and witnesses are constantly asked whether certain statements have not been made to them by other persons.

Confessions,
when admitted
in evidence.

5. *Confessions*, under certain circumstances, are not admitted as evidence ; and when they are admissible they are received with great caution, not only from the consideration that owing to insanity or other reason, they may be false, but also there is the danger of their not having been correctly reported. The general rule is, that to be admissible a confession must be free and voluntary ; and that it was so must be proved affirmatively by the prosecution, and if any doubt exists as to this, the evidence ought to be rejected (c). If an objection is raised to the admissibility of such evidence on the ground that the confession was not free and voluntary, it is usual to allow the defendant's counsel to cross-examine on this point before the effect of the confession is stated. Whether a particular confession is free and voluntary, is sometimes a difficult question to decide. " Thus much is certain, that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority ; and on the whole, the tendency of the present decisions seems to be to admit any confessions which do not come within this

(a) 11 & 12 Vict. c. 42, s. 17. So, also, as to depositions on behalf of the accused, 30 & 31 Vict. c. 35, s. 3, v. also p. 433.

(b) *R. v. Stephenson*, 31 L. J. (M.C.) 147 ; L. & C. 165 ; 6 L. T. 334 ; 9 Cox, 156 ; Warb. L. C. 251.

(c) *R. v. Thompson*, L. R. (1893), 2 Q. B. 12 ; 62 L. J. (M.C.) 93 ; 69 L. T. 22 ; 41 W. R. 525 ; 57 J. P. 312.

proposition" (a). Judges are now less disposed than they formerly were to hold that the language used amounts to an inducement. The inducement must proceed from a person in authority; the prosecutor, officers of justice, magistrates and other persons in similar positions, are persons in authority (b); but not the prisoner's master, unless the crime or offence be committed against him (c). Such words as, "you had better tell the truth," are held to import either a threat or a benefit; and if they be used by a person in authority and in consequence of their use the prisoner makes a confession, it is not admissible in evidence, by reason of having been obtained through an inducement (d). But a statement by a person in authority, *e.g.*, a constable, to the prisoner, that he need not say anything to criminate himself, but that what he might say would be taken down and used as evidence against him, is not an inducement, and a confession obtained by means of it is receivable (e). Again, if a confession be made after the impression produced by any inducement has been completely removed, it is admissible (f). A confession or admission made to a police constable in answer to questions put by him to the prisoner before his arrest and without any threat or inducement, is admissible (g). But such a confession may be refused in evidence if it be the result of questions put to the prisoner after he is in custody, whether by the police (h), or by the prosecutor in the presence of the police (i). Though a confession may be inadmissible,

(a) Rosc. 40.

(b) Rosc. 44.

(c) *R. v. De Moore*, 2 Den. 522; 21 L. J. (M.C.) 199.(d) *v. cases* referred to in Arch. 261, and *R. v. Jarvis*, L. R. 1 C. C. R. 96; 37 L. J. (M.C.) 1; 17 L. T. (N.S.) 515; 16 W. R. 111; *R. v. Ros* 67 L. J. (Q.B.) 289; 78 L. T. 119.(e) *R. v. Baldry*, 2 Den. C. C. 430.(f) *R. v. Clewes*, 4 C. & P. 221.(g) *Rogers v. Hawken*, 67 L. J. (Q.B.) 526; 62 J. P. 279.(h) *R. v. Gavin*, 15 Cox, 656; *R. v. Male*, 17 Cox, 689; *v. contra R. v. Johnston*, 15 Ir. Com. Law Rep. 60; *R. v. Brackenbury*, 17 Cox, 628; *R. v. Miller*, 18 Cox, 54. In the last case the questions were put by a police officer and voluntarily answered by the prisoner *before* he was taken into custody.(i) *R. v. Fennell*, L. R. 7 Q. B. D. 147; 50 L. J. (M.C.) 126; 44 L. T. (N.S.) 687; 29 W. R. 742; Warb. L. C. 234.

the fact that a discovery was made in consequence of it is not (a).

Against whom
confessions are
admitted in
evidence.

A confession is admissible only against the person who makes it, though, of course, if the jury hear anything in it against accomplices, it will be apt to prejudice them against such co-defendants.

Confessions
before
magistrates.

With regard to confessions or statements before the magistrate, it is provided by statute (b) that, after the examination of all the witnesses for the prosecution, the magistrate shall have all the depositions against the accused read to him, and shall then say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." The magistrate gives a further caution that the accused has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to induce him to make any confession or admission of his guilt. But this second caution is necessary only when it appears that some inducement has been holden out to the accused (c). Any statement which the prisoner may then make before the magistrate is read at the trial from the depositions without further proof.

Evidence of a
statement
made in
prisoner's
presence.

Evidence is sometimes tendered of a statement made by another person in the prisoner's presence. The admissibility of such evidence depends upon the circumstances of the case. We have already referred to two instances where such a statement is admissible as evidence, *i.e.*, where it is part of the *res gestæ*, and where it amounts to a dying declaration. In other cases, however, such a statement is not admissible and cannot be

(a) *R. v. Gould*, 9 C. & P. 364.

(b) 11 & 12 Vict. c. 42, s. 18.

(c) *R. v. Sansome*, 19 L. J. (M.C.) 143.

submitted to the jury unless in the opinion of the judge there is evidence (1) that the prisoner had at the time when the statement was made the opportunity of explaining or denying it; (2) that the occasion was one upon which he might reasonably be expected to make some observation or denial, and (3) that either by words, acquiescence, or silence the prisoner substantially admitted the truth of the whole or some portion of the statement made in his presence. It must also be observed that even when such a statement is admissible it does not in itself afford any evidence whatever of the *facts* which it relates; the only evidence is the prisoner's admission if he makes one, and it is for this reason that, unless by words or demeanour he makes an admission, evidence of the statement made in his presence cannot be given (*a*).

CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE.

It is usual to distinguish two kinds of evidence, *Direct* or *Positive*, *Circumstantial*, or *Presumptive*. By the former we mean the evidence given by a person who testifies to having actually seen, &c., the act constituting the crime committed; the proof applying immediately to the *factum probandum*, without any intervening process. All other evidence is termed indirect, presumptive, or circumstantial; being evidence of facts, from which the fact of the crime may be inferred as a natural or very probable conclusion from them; it applies to collateral facts which contribute to the conclusion that the principal fact exists. Thus, if a witness proves that he saw the prisoner cut A.'s throat, or put his hand into B.'s pocket, draw out his purse, and run away, the evidence is direct. But if the witness proves that the prisoner was seen going to B.'s house at four o'clock, that there was no other person in the house at the time, that at 4.15 B.'s throat was found cut, and that a blood-

Circumstantial
distinguished
from direct
evidence.

(a) 1 Tayl. Ev. pp. 527, 528; *R. v. Smith*, 61 J. P. 120; 18 Cox, C. C. 470.

stained knife was found concealed in the prisoner's locked box, the evidence is circumstantial.

Fineness of the distinction.

It is difficult to draw the line between direct and circumstantial evidence. This will be seen more readily from an example. A. stabs B. in three places: it is not known in consequence of which of the wounds death ensues. C. sees A.'s hand raised to strike one of these blows. Is his evidence to be regarded as direct or circumstantial as to the murder? In other words, it is often impossible to draw the line between the principal fact and subsidiary facts. And if it were possible clearly to distinguish, what would be the advantage? It would certainly be incorrect to say that direct is always stronger than circumstantial evidence. It may be that in the former there is not the danger involved in drawing the inferences which are incidental to the latter; but, on the other hand, in the latter more facts are generally put in evidence by a greater number of witnesses, and thereby any mistake is much more likely to be exposed.

Circumstantial evidence, conclusive or presumptive.

The so-called circumstantial evidence is said to be of two kinds:—

Conclusive, when the connection between the principal and evidentiary facts is a necessary consequence of the laws of nature; as in an *alibi*.

Presumptive, when it only rests on a greater or less degree of probability (*a*). Such evidence is termed "presumptive," inasmuch as the fact to be proved is to be presumed from certain other facts.

Presumptions classified.

Presumptions, or inferences of other facts from facts which are already admitted or proved, are sometimes divided into violent, probable, slight or rash, according as the facts presumed necessarily, usually, or otherwise attend the fact proved. A more scientific classification is into Presumptions:—

(a) Best, Ev. 25, 289.

- i. *Juris et de jure*.
- ii. *Juris*.
- iii. *Facti* or *hominis*.

The last of these is the kind of probable presumption produced by evidence in the way we have noticed. The other two must be explained :—

i. *Juris et de jure*.—Presumptions of this character are by law absolute, conclusive, and irrebuttable. No evidence is allowed to be given to the contrary. For example, that an infant under the age of seven is incapable of committing a felony ; that every person knows the law. *Præsumptio juris et de jure.*

ii. *Juris*.—Presumptions which are conditional, inconclusive, and rebuttable. They only hold good until the contrary is proved. For example, a child between the ages of seven and fourteen is presumed to be incapable of committing a felony ; but only till it is proved that he had a mischievous discretion. A person is presumed to be innocent till he is shown to be guilty. Malice is presumed from the act of killing, unless its absence be shown. *Præsumptio juris.*

WRITTEN EVIDENCE.

Written documents may be divided into three classes ; differing as to the manner in which they must be given in evidence and proved :— Written evidence.

- i. Records.
- ii. Matters *quasi* of record.
- iii. Written documents of a private nature.

i. *Records*.—First, as to Acts of Parliament. Public statutes do not need any proof ; the court is bound judicially to take notice of them. And all Acts passed since February 4th, 1851, are to be taken as public Acts unless the contrary be expressly provided (a). Private Acts of Parliament.

(a) 13 & 14 Vict. c. 21, ss. 7, 8.

Acts must be proved by an examined copy of the Parliament roll ; or by a copy purporting to be printed by the Queen's printers. As regards proof, general customs of the realm are on the footing of public Acts ; particular customs on that of private Acts (a).

Other records.

As to other records.—Inasmuch as the records of the various courts are frequently required to be given in evidence, perhaps in two places at the same time, and thus inconvenience would arise, as well as the danger of destruction or loss, the production of the originals is not required. Their place is supplied by an exemplification of the record under the Great Seal, or under the seal of the court, or by a copy sworn to be true by a person who has compared it with the original. But such last-mentioned copy will not suffice if the matter of the record forms the gist of the pleading, *e.g.*, on a plea of *autrefois acquit* (b). A copy of a copy will never suffice. In certain cases not even a copy of the whole record is required. Thus to prove a previous conviction or acquittal, it is sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof (c). And further, it has been provided that a previous conviction may be proved in any legal proceeding by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract in the case of an indictable offence is explained to be a certificate of the indictment and conviction of the nature of that described in 14 & 15 Vict.

Previous
conviction,
how proved.

(a) Arch. 279.

(b) *Ibid.* 280.

(c) 14 & 15 Vict. c. 99, s. 13. See also 7 & 8 Geo. 4, c. 28, s. 11 ; 21 & 25 Vict. c. 96, s. 116 ; c. 99, s. 37.

c. 99, s. 13; and in case of a summary conviction consists of a copy of the conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. And there is no need to prove the signature or official character of the person whose signature appears (*a*).

ii. *Matters quasi of record*.—Without going into detail, Matters quasi of record, how proved, it may be said generally that the proceedings, not being records, of any of the Divisions of the High Court, or of the Ecclesiastical Courts, may be proved by copies; but upon a prosecution for perjury in an affidavit, the original affidavit, if it exists, must always be produced; if it does not exist, proof of its loss and secondary evidence of its contents may be given (*b*). Proceedings in county courts are proved by the production of the document bearing the seal of the court (*c*). In the case of proceedings in other inferior courts the proof is by producing the books in which the entry has been made, or by an examined copy. As to bankruptcy proceedings, a copy of the *London Gazette*, containing any notice of a receiving order, or of an adjudication of bankruptcy, is conclusive evidence of the order or adjudication (*d*).

We have already noticed the provision which is made Perpetuating the testimony of a dying person. for the reading of the depositions for or against the prisoner in the case of a witness who is dead or too ill to travel (*e*). To perpetuate the testimony which can be given by a person whose death is apprehended it is also provided that—if it appear to some justice of the peace that any person dangerously ill, and in the opinion of a registered medical practitioner, not likely to recover, is able to give material information relating to an indictable

(*a*) 34 & 35 Vict. c. 112, s. 18.

(*b*) *R. v. Milnes*, 2 F. & F. 10.

(*c*) 51 & 52 Vict. c. 43, s. 180.

(*d*) 46 & 47 Vict. c. 52, s. 132 (2). See also ss. 133–140 as to the proof of other proceedings in bankruptcy.

(*e*) v. p. 425.

offence, and it is not practicable to take his deposition in the ordinary way—the justice may take in writing the statement on oath or affirmation of the person who is ill. Having observed the formalities prescribed by the statute, such depositions are transmitted to the proper quarter. And if on the trial of the offender it is proved that the deponent is dead, or will not in all probability ever be able to travel or give evidence, the statement may be read in evidence (*a*). But it is a condition precedent to the admission in evidence of such a statement that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read, and that such person had full opportunity (*b*), if he so wished, of cross-examining the deponent (*c*). With regard to offences punishable under the Prevention of Cruelty to Children Act, 1894, there are special provisions in that Act (*d*), for taking the deposition of a child whose attendance in court would involve serious danger to its life or health.

Deeds, &c.,
how proved.

iii. *Written documents of a private nature.*—As to *deeds*.—As a general rule, if they are to be given in evidence, they must be produced themselves at the trial. But in case of loss or destruction, the contents may be proved by copies or other secondary evidence. And so also if other written documents are lost, secondary evidence may be received, if the genuineness of the original instrument is proved at the same time (*e*), but if the document is in the possession of the opposite party he must be served with notice to produce it or evidence of its contents cannot be given (*f*). The notice to produce must be given a reasonable time before the trial. The notice may be verbal (*g*), but it is always better that it should be in writing.

(*a*) 30 & 31 Vict. c. 35, s. 6.

(*b*) *R. v. Mitchell*, 17 Cox, 503, where the witness became so much worse during the cross-examination that the magistrate stopped the cross-examination; the evidence was held to be inadmissible.

(*c*) *R. v. Shurmer*, 55 L. J. (M.C.) 153.

(*d*) 57 & 58 Vict. c. 41, ss. 13, 14. As to this Act, v. p. 186, *ante*.

(*e*) v. p. 415.

(*f*) *R. v. Elworthy*, L. R. 1 C. C. R. 103; Warb. L. C. 236.

(*g*) *Smith v. Young*, 1 Camp. 440.

The manner of the proof of the execution of deeds and other written instruments is the same. If the instrument is one to the validity of which attestation is requisite (*a*), it must be proved by a subscribing witness. But to this rule there are several exceptions ; for example, if the witness be dead, insane, &c. (*b*). But if the instrument is not one which requires attestation, even though it be actually attested, it need not be proved by the attesting witness (*c*), but may be proved by simple evidence of the party's handwriting ; and a deed which is 30 years old is said to prove itself ; that is to say, the execution of it need not be proved at all provided that it is produced from custody which affords a reasonable presumption in favour of its genuineness and that the deed does not on the face of it appear suspicious, as, for example, by containing interlineations or erasures (*d*).

Handwriting may be proved in several ways (*e*) :—

Handwriting,
how proved.

(*a*) By one who has seen the party write (*ex visu scriptio*).

(*b*) By one who has carried on a correspondence with the person whose writing it is desired to prove, or had other opportunities of getting acquainted with his writing (*ex scriptis olim visis*).

(*c*) By comparison with documents known and admitted to be in the handwriting of the party (*ex scripto nunc viso*, or *ex comparatione scriptorum*). It is provided by statute that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*f*).

(*a*) A list of these documents will be found in 2 Tayl. Ev. 1207.

(*b*) v. Arch. 309. (*c*) 28 & 29 Vict. c. 18, s. 7. (*d*) 1 Tayl. Ev. 86.

(*e*) For fuller details and authorities, v. 2 Tayl. Ev. 1219 *et seq* ; Arch. 311 ; also p. 261. *ante*.

(*f*) 28 & 29 Vict. c. 18, s. 8.

Points in which rules of evidence in civil and in criminal cases differ.

It may be useful to notice the chief points in which differences exist between the rules of evidence in civil and criminal cases.

1. In the latter in some cases more than one witness is required (*a*).

2. Confessions and admissions—in criminal cases, with great caution, and only when they are free and voluntary; in civil cases, unreservedly (*b*).

3. A party to a civil cause gives his evidence just as an ordinary witness, and can even be called as a witness for his opponent. A prisoner, on the other hand, cannot be called as a witness for the prosecution; and although he can now in all cases give evidence on his own behalf, there are certain special provisions which affect him as a witness (*c*).

4. The wife (or husband) of a prisoner cannot in all cases be called as a witness against him (*d*); whereas in a civil action she may always give evidence for his opponent.

5. The use in criminal cases of the depositions of witnesses prevented from attending in person (*e*); and their use to contradict the witness at the trial itself (*f*). In civil actions there is, however, the somewhat analogous process of examining aged and infirm witnesses upon commission.

6. In cases of homicide, the dying declaration of the deceased is admitted in evidence as to the cause of death (*g*).

7. Witnesses to good character are allowed in all criminal cases, whereas in civil actions this is only permitted to contradict evidence of bad character offered by the opposite party, which evidence can only be given where the general character of the party is one of the facts in issue in the action.

(*a*) v. p. 404.

(*b*) v. p. 426.

(*c*) v. p. 394.

(*d*) v. p. 393.

(*e*) v. p. 425.

(*f*) v. p. 414.

(*g*) v. p. 424.

The above refers only to the *admissibility* of evidence. But it must always be borne in mind that, while in civil litigation evidence may be nicely balanced, and the jury have to decide to which side the balance inclines, the evidence to be offered in support of a criminal charge must be of a much more cogent nature, and, to justify a conviction, must satisfy the jury beyond any reasonable doubt that the accused is guilty of the offence charged.

CHAPTER XVIII.

VERDICT.

Verdict, how arrived at, and how given.

WE have already considered the province of the jury and the opportunities afforded to them for considering their verdict. In order to clear up any difficulties, they may ask the opinion of the judge on any point which is not exclusively for their determination; or may have read over to them by the judge any part of the evidence; or, through the judge in court, may ask any additional question of any witness. If they cannot after a reasonable time agree upon their verdict, they are discharged (*a*); the prisoner, of course, being liable to be tried again. Before finding the prisoner guilty, they must be unanimous in believing that there is no reasonable doubt of his guilt, not necessarily that there is no other possible explanation. If they do all agree, on coming into court again, if they have retired, they answer to their names. The clerk of assize, clerk of the peace, or other officer, thus addresses them—"Gentlemen, have you agreed upon your verdict?" "How say you, do you find John Styles guilty or not guilty?" They deliver their verdict through the foreman. In treason or felony the prisoner must be present when this is done; but not necessarily in misdemeanor.

Verdicts, general, partial, or special.

Verdicts in criminal cases must be distinguished into:—

General—*i.e.*, "guilty" or "not guilty" on the whole charge.

(*a*) v. p. 382 as to discharge on account of death, &c., of juror.

Partial—as when the jury convict on one or more counts of the indictment and acquit on the rest.

Special—when the facts of the case as found by the jury are set forth, but the court is desired to draw the legal inference from the facts, for example, whether they amount to murder or manslaughter. But in such a case, before the judge can direct a verdict of guilty to be entered, the jury must have found all the facts necessary to constitute the offence. Where a jury unable to agree upon a verdict of guilty or not guilty in a case of larceny stated in answer to the judge that they believed all the evidence for the prosecution, and the judge thereupon directed a verdict of guilty to be entered, the conviction was quashed as the jury had not found expressly that the prisoner had any *animus furandi* (a).

In every case the jury have a right to return either a general or a special verdict, as they may think fit (b). If, however, the verdict is so imperfect that no judgment can be given upon it, a new trial may be ordered (c).

The jury may acquit one of several defendants who are joined in the same indictment and convict the others, and *vice versa*; even though charged with jointly receiving (d). But in cases where to constitute the crime it is necessary that a certain number should join in it, if so many are acquitted that less than the requisite number are left, these also must be acquitted—thus, three at least are necessary for a riot, two for a conspiracy. Verdict if there are several defendants.

A person charged with a felony or misdemeanor may be found guilty of an *attempt* to commit the same offence (e), the same consequences following as if he had been in the first instance charged with the attempt only. Verdict of attempt.

(a) *R. v Farnborough*, L. R. [1895] 2 Q. B. 484; 64 L. J. (M.C.) 270; 73 L. T. 351; 44 W. R. 48; 59 J. P. 505.

(b) 1 Chit. Cr. Law, 641.

(c) *Ibid.* 646; *Campbell v. R.*, 11 Q. B. 799; 17 L. J. (M.C.) 89.

(d) 22 & 25 Vict. c. 96, s. 94.

(e) 14 & 15 Vict. c. 100, s. 9.

Verdict of misdemeanor, though facts amount to felony.

Upon an indictment for a misdemeanor, if the facts given in evidence amount to a felony, the prisoner is not on that account to be acquitted of the misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court thinks fit to discharge the jury and to order the defendant to be indicted for the felony (a).

Cases in which verdict may be for crime not charged in indictment.

Upon an indictment for *robbery*, the prisoner may be found guilty of an *assault with intent to rob* (b).

Upon an indictment for *larceny*, the prisoner may be found guilty of *embezzlement*, and *vice versa* (c).

Upon an indictment for obtaining by *false pretences*, if the offence turns out to amount to *larceny*, the defendant may still be convicted of false pretences (d).

Upon an indictment for rape or for any offence made felony by sect. 4 of the Criminal Law Amendment Act (as to which *vide* p. 166), the prisoner may be convicted of the misdemeanors mentioned in sects. 3, 4, or 5 of that Act, or of an indecent assault (e), and upon an indictment for the misdemeanor of carnally knowing a girl between the ages of thirteen and sixteen, the defendant may be convicted of a common assault only (f).

And whenever a person is indicted for an offence which includes in it an offence of minor extent and gravity of the same class, the prisoner may be convicted of such minor offence (g). Thus, on an indictment for murder, he may be convicted of manslaughter; so of simple larceny, if indicted for stealing in a dwelling-house, or any other aggravated form of larceny (h).

Verdict objected to by the judge.

If the judge is dissatisfied with the verdict he may direct the jury to reconsider it, and their subsequent verdict will stand as a true one. If, however, the

(a) 14 & 15 Vict. c. 100, s. 12.

(b) 24 & 25 Vict. c. 96, s. 41.

(d) *Ibid.* s. 88; v. p. 237.

(e) 48 & 49 Vict. c. 69, s. 9.

(g) v. Rosc. 77.

(c) *Ibid.* s. 72.

(f) *R. v. Bostock*, 17 Cox, 700.

(h) v. Arch. 188.

jury insist upon having the first recorded, it must be recorded (*a*).

Where an indictment contains several counts it is often advisable to take a separate verdict on each count in case objection should be taken to any particular count. Separate verdict on each count.

If a verdict of acquittal is returned, the prisoner is for ever free from the present accusation; and he is discharged in due course, unless there is some other charge against him (*b*). If, however, he is acquitted merely on account of some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indictment for the same offence (*c*), he may be detained and indicted afresh. If he is acquitted on the ground of insanity at the time of the commission of the offence, whether such offence was a felony or misdemeanor (*d*), he must be kept in custody until the Queen's pleasure be known; and the Queen may order his confinement during her pleasure (*e*). Acquittal, consequences of.

If a verdict of guilty is brought in, the accused is said to be convicted. The jury may annex to such a verdict a recommendation to mercy on any grounds they think proper—which recommendation will usually be taken into consideration by the judge. Conviction.

If there is a second indictment against a prisoner who has been found guilty, frequently it is not proceeded with if the charge is similar to that on which he has just been convicted. The counsel for the prosecution often merely gives the court an outline of the case. If the prisoner is acquitted, the second indictment is then proceeded with, unless it is obvious that there is no more evidence than in the first case. Second indictment.

If a prisoner indicted for any felony (*f*) or the offence Conviction after previous conviction.

(*a*) 2 Hale, P. C. 309; Arch. 190.

(*b*) As to the circumstances under which a new trial will be ordered in certain cases of misdemeanor, *v. post*, p. 464.

(*c*) *v. p.* 368, Arch. 191.

(*d*) 46 & 47 Vict. c. 38, ss. 1 and 2.

(*e*) *v. p.* 362, as to insanity at time of trial and not of commission of offence.

(*f*) 7 & 8 Geo. 4, c. 28, s. 11.

of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining goods or money by false pretences, or of conspiracy to defraud, or of any misdemeanor under 24 & 25 Vict. c. 96, s. 58 (a), has been found guilty, then, if he has been previously convicted of any of the above crimes, he is asked whether he has been so previously convicted, the previous conviction being also alleged in the indictment. If he admits it, the court proceeds to sentence him. But if he denies it, or will not answer, the jury are then, without being again sworn, charged to inquire concerning such previous conviction; the point to be established being the identification of the accused with the person so convicted (b). If, however, the prisoner gives evidence of good character, the previous conviction may be proved during his trial, and in this case the jury inquire into the previous conviction and the subsequent offence at the same time (c).

(a) v. p. 252.

(b) 34 & 35 Vict. c. 112, ss. 8, 18, 20; see also 24 & 25 Vict. c. 96, s. 116; c. 97, s. 37.

(c) Though the previous conviction does not fall within the scope of the above provision, the judge has before him a record of it and all other occasions on which the accused has been before a criminal court. See p. 221, as to evidence of certain previous convictions on an indictment for receiving.

CHAPTER XIX.

JUDGMENT.

BEFORE judgment, in cases of treason and felony, the prisoner is asked whether he has anything to say why the court should not proceed to pass sentence upon him. Judgment.

The interval between conviction and judgment is the time for the defendant to move the court in *arrest of judgment*. Arrest of judgment. This motion can only be grounded on some defect apparent on the face of the record, and not on any irregularity in the proceedings or on the insufficiency of the evidence. The objection must be a substantial one, such as want of sufficient certainty in the indictment as to the statement of facts, &c. (a). But judgment will not be arrested if the defect has been amended during the trial, or is such an one as is aided by verdict. The court itself will arrest judgment if it is satisfied that the defendant has not been found guilty of an offence in law. If judgment is arrested, the proceedings are set aside, and the prisoner is discharged. But, unlike an ordinary acquittal, the defendant may be indicted again on the same facts (b).

Judgment may be postponed if the court wishes to reserve any point of law for the consideration of the Court for Crown Cases Reserved (c). Judgment postponed.

If the defendant has been found guilty of a misdemeanor in his absence (in felonies he must be present), process issues to bring him to receive judgment; and on non-appearance he may be prosecuted to outlawry (d). Verdict in absence of prisoner.

(a) Arch. 194, 195.
(c) v. p. 467.

(b) *Ibid.* 195.
(d) v. p. 354.

If he has been allowed to leave the court on entering into recognizances to come up for judgment when called upon, and he fails to come up, his recognizances will be forfeited and a warrant issued for his apprehension.

Giving
judgment.

Judgment or sentence is given by the court, the judge adding such remarks as he thinks proper. Formerly, in all capital felonies, when the court thought that the person convicted was a fit subject for royal mercy, it was lawful, instead of publicly giving sentence of death, to enter it on the record, the effect being the same (*a*). But now sentence of death must be pronounced on conviction for murder (*b*).

(*a*) v. 4 Geo. 4, c. 48, s. 1; 24 & 25 Vict. c. 95.

(*b*) 24 & 25 Vict. c. 100, s. 2.

CHAPTER XX.

INCIDENTS OF TRIAL.

SOME miscellaneous points connected with a criminal trial remain to be noticed, now that we have viewed the general order of proceedings.

Defence in formâ pauperis. — In cases of extreme poverty (that is, when the defendant will swear that he is not worth £5 in the world, besides his wearing apparel, after paying his debts) the defendant may petition the Queen's Bench Division to be allowed to defend himself as a pauper. His petition must be verified at the same time by an affidavit. It (the petition) is presented either to a judge at chambers or in court. On the prayer of the petition being granted, a rule is drawn up by the judge's clerk, mentioning the name of the counsel and attorney assigned for the defence; and this must be produced when the pauper requires anything to be done without payment of fees (a).

This procedure, however, is only applicable to indictments for misdemeanor which have been removed to the Queen's Bench Division, but there is also a custom of a similar nature which may be allowed in all prosecutions. In cases where there is a special difficulty, or where the consequences are very serious, and therefore usually on indictments for murder, if the prisoner is not defended by counsel, the judge requests some barrister to give his honorary services to the prisoner.

(a) Arch. 163. *R. v. Dugdale*, Corner's Cr. Prac. 167. This procedure is very rarely adopted, and it may even be questioned whether the effect of 46 & 47 Vict. c. 49, repealing 11 Hen. 7, c. 12, is not to rescind it entirely.

View of *locus in quo*.

Views of locus in quo by the jury.—The judge may allow the jury to view the scene of the crime, or other occurrence under investigation, at any time during the trial, even after the summing-up. But care should be taken that no improper communications are made at the view; and that no evidence is received by the jury in the absence of the judge and the prisoner (*a*).

Adjournment of trial.

Adjournment of the trial.—If the trial is not concluded on the same day on which it is commenced, the judge may adjourn from day to day (*b*). And a judge may adjourn a case and proceed with another if the emergency requires it, as, for example, to give time for the production of something essential to the proof, or for the witnesses to arrive (*c*).

Withdrawal from prosecution.

Withdrawal from prosecution.—Sometimes the prosecutor is desirous of withdrawing from the prosecution, the accused engaging not to bring an action for trespass and false imprisonment or malicious prosecution. If the offence is a misdemeanor more immediately affecting the individual, *e.g.*, a battery, this will be allowed, and such an agreement can be enforced; but not if the offence is a felony or a misdemeanor of a more public nature (*d*). Even after verdict, if the court deems such a course proper, the defendant is sometimes allowed to “talk with the prosecutor,” with a view to compensation being made. Though a person is not obliged in the first instance to prosecute another whom he suspects of crime, that is, not until he has been bound over by the magistrate to prosecute and give evidence, it is an offence to take a reward not to prosecute (*e*).

Restitution of goods.

Restitution of goods.—In certain cases the court has power to order goods which have been stolen or fraudu-

(*a*) *R. v. Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M.C.) 113; 26 L. T. (N.S.) 778; 20 W. R. 1016.

(*b*) As to what happens to the jury in the interval, *v. p.* 382.

(*c*) *R. v. Wenborn*, 6 Jur. 267.

(*d*) *v. Rawlings v. Coal Consumers' Association*, 43 L. J. (M.C.) 111; 30 L. T. (N.S.) 469; 22 W. R. 704; *Windhill Local Board v. Vint*, L. R. 45 Ch. Div. 351; 59 L. J. (Ch.) 608; 63 L. T. 366; 38 W. R. 738.

(*e*) *v. p.* 85.

lently obtained to be given up to the original owner. This power now depends upon sect. 100 of the Larceny Act (a), which has, however, been modified to a certain extent by sect. 24 of the Sale of Goods Act, 1893 (b).

By sect. 100 of the Larceny Act it is provided that if any ^{Larceny Act, sec. 100.} person guilty of a felony or misdemeanor mentioned in that Act in stealing, obtaining, extorting, embezzling, converting or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property shall be indicted for such offence by or on behalf of the owner of the property and convicted thereof, the property shall be restored to the owner, and the court before whom the offender is tried shall have power to award writs of restitution for the property or to order the restitution thereof in a summary manner. But if it shall appear before any such order is made that any valuable security shall have been *bonâ fide* paid or discharged by the person liable to payment, or, being a negotiable instrument, shall have been *bonâ fide* received by transfer or delivery by some person for a just and valuable consideration, without notice or reasonable cause to suspect that it had been stolen or fraudulently obtained, in such case the court shall not order restitution of such security. Nor does the power to order restitution extend to the case of a prosecution of a trustee, banker, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any *misdemeanor* against the Larceny Act (c).

It is desirable to point out shortly what are the rights ^{Where goods stolen.} of an owner of goods which have been stolen from him, or obtained from him by false pretences. If they have been *stolen*, he may, if he can do so without a breach of the peace, retake them wherever he finds them (d), as the goods are still his; with this exception, that, if the goods have since the theft been sold in *market overt* to a

(a) 24 & 25 Vict. c. 96.

(b) 56 & 57 Vict. c. 71.

(c) As to these misdemeanors, v. p. 231 *et seq.* *Chichester v. Hill*, 15 Cox, 258.

(d) 4 Bl. 363.

bona fide purchaser, the person from whom they were stolen cannot recover them from the purchaser (a), unless he first prosecutes the thief and obtains his conviction. If he does so obtain a conviction, the property in the goods is, by force of the 100th sect. of the Larceny Act, revested in him and he can either apply for an order under that section or bring an action to recover possession of the goods (b). This, which has for many years been the law on the subject, has now been formally enacted by the Sale of Goods Act, 1893 (c), which provides that where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, notwithstanding any intermediate dealing with them by sale in market overt or otherwise.

Where goods
obtained by
false pretences.

When, however, goods are *obtained by false pretences* the right to the goods depends upon different considerations. The original owner is still entitled, as in the case of larceny, to retake them from the person who fraudulently obtained them, or from any person who holds them on his behalf if he can do so without committing a breach of the peace. Moreover, before the Sale of Goods Act, 1893 (d), if he obtained a conviction of the fraudulent person, he could have recovered them from a *bona fide* purchaser who had bought them from him, even although, as a result of the fraud, the prosecutor had himself been induced to sell the goods to the person convicted (e), inasmuch as although in such a case the goods having been originally sold by the prosecutor, the property passed to the fraudulent person, and from him to the purchaser, who could not in the absence of a con-

(a) 56 & 57 Vict. c. 71, s. 22. *Market overt* includes all markets established by grant or prescription, though probably not a market established by a local Act. Moreover, all shops in the City of London are market overt for the sale of goods usually sold in such shops. 2 Bl. 449; *Hargreave v. Spink*, L. R. [1892], 1 Q. B. 25; 61 L. J. (Q.B.) 318; 65 L. T. 650; 40 W. R. 254.

(b) *Scattergood v. Sylvester*, 15 Q. B. 506; 19 L. J. (Q.B.) 447.

(c) 56 & 57 Vict. c. 71, s. 24 (1).

(d) *Ibid.*

(e) *Bentley v. Vilmont*, L. R. 12 App. Cas. 471; 57 L. J. (Q.B.) 17; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68.

ription be compelled to give them up (a), it was nevertheless held that the effect of the 100th sect. of the Larceny Act was that, upon the conviction, the property in the goods reverted in the prosecutor. But this hardship is now remedied by sect. 24 (2) of the Sale of Goods Act, 1893, which provides that notwithstanding any enactment to the contrary (b), where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods by reason only of the conviction. This section, however, will probably be held not to apply to cases where there never has been any contract between the prosecutor and the fraudulent person passing the property, as where the fraud consists in a representation by the latter that he is some other person to whom the prosecutor really intended to sell his goods (c); nor to cases where the goods have been obtained by some trick amounting to larceny. It must, however, always be borne in mind that if once a contract of sale has actually existed, although it might have been induced by fraud and therefore be voidable at the option of the party defrauded, yet the contract was not originally *void*; and if possession of the goods is obtained under such a contract by the person defrauded with the seller's consent, though for a temporary purpose only, and they are then sold or pledged with an innocent person before the contract is avoided, the original seller cannot recover them (d), and the fact of a conviction following will not now affect the *bona fide* purchaser's or pledgee's rights.

(a) v. 56 & 57 Vict. c. 71, s. 23.

(b) i.e., sect. 100 of the Larceny Act.

(c) As in *Cundy v. Lindsay*, L. R. 3 App. Cas. 459; 47 L. J. (Q.B.) 481; 38 L. T. 573; 26 W. R. 406.

(d) 56 & 57 Vict. c. 71, ss. 23, 25; v. *Payne v. Wilson*, L. R. [1895], 1 Q. B. 653; 64 L. J. (Q.B.) 328; 72 L. T. 110; 43 W. R. 250; the judgment in this case was, by consent, reversed on appeal (L. R. [1895], 2 Q. B. 537); but only on the ground that there was in law no agreement to buy. The conviction in that case was for *larceny* as a bailee, but the court held that even a conviction for larceny would not defeat the title acquired by an innocent purchaser, under sect. 9 of the Factors Act, 1889, which is in the same terms as sect. 25 (2) of the Sale of Goods Act, 1893.

In cases in which there is power to order restitution, such an order can only be made against a person actually in possession of the goods at the time of the conviction. It cannot be made against a purchaser who has sold them again before the conviction, even with notice of the theft (*a*). The court may have power in such a case to order restitution of the *proceeds* of the goods, but that power ought not to be exercised unless such proceeds are in the hands of the convicted person or his agent (*b*).

It is entirely in the discretion of the court whether it will make an order of restitution or not (*c*), and if the order be refused the prosecutor still has his remedy by action if the legal property in the goods is still vested in him (*d*). If there is a serious question of law as to the rights of the parties, the court usually declines to interfere, and leaves the prosecutor to bring an action.

Property found
on prisoner.

The court before which a prisoner is tried has no power, as a rule, to order property not forming or connected with the subject of the indictment, although found on the prisoner, to be disposed of in a particular manner (*e*). But an exception has been made to this by a statute which provides that on the conviction of a prisoner for stealing any property, the court shall have power, if it appears that the prisoner has sold the stolen property to a person who had no knowledge that it was stolen, to make an order, on the restitution of the stolen property to the prosecutor, that out of any money found on the prisoner on his apprehension, a sum not exceeding the amount of the proceeds of the sale be delivered to the purchaser (*f*).

(*a*) *Horwood v. Smith*, 2 T. R. 750.

(*b*) *R. v. Justices of Central Criminal Court*, L. R. 17 Q. B. D. 598; 56 L. J. (M.C.) 25; 56 L. T. 352; 35 W. R. 243; 51 J. P. 229.

(*c*) *Vilmont v. Bentley*, L. R. 18 Q. B. D. at p. 327.

(*d*) *Scattergood v. Sylvester*, 15 Q. B. 506; 19 L. J. (Q.B.) 447.

(*e*) *R. v. Corporation of London*, 27 L. J. (M.C.) 231; 22 Jur. 1078; E. B. & E. 509. As to the power of a Court of Summary Jurisdiction to order property taken from a person charged before such Court to be returned to him, v. 42 & 43 Vict. c. 49, s. 44.

(*f*) 30 & 31 Vict. c. 35, s. 9; v. also p. 463, *post*.

Where any property has come into the possession of the police in connection with any criminal charge, or has been stopped by a pawnbroker or other person under sec. 103 of the Larceny Act or sec. 34 of the Pawnbrokers Act, 1872, a court of summary jurisdiction may, on application by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrates to be the owner, or, if the owner cannot be ascertained, make such order as to the property as to the court shall seem meet (a). Property in possession of police.

If the stolen property has been pawned for not more than £10 the court may order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment of any part thereof, as the court, according to the conduct of the owner and the other circumstances of the case, thinks just and fit (b). Restitution may also be ordered, in similar cases, by magistrates convicting of larceny, in the exercise of their summary jurisdiction (c). Goods pawned.

A metropolitan police magistrate has also power to order delivery of goods, under the value of £15, unlawfully detained within the limits of the Metropolitan Police District (d).

(a) 60 & 61 Vict. c. 30, s. 1.

(b) 35 & 36 Vict. c. 93, s. 30.

(c) 42 & 43 Vict. c. 49, s. 27 (3). As to the Metropolis v. 2 & 3 Vict. c. 71, ss. 27 & 28, v. also p. 463 as to compelling a convicted felon to make compensation to the person who has lost his property by reason of the felony.

(d) 2 & 3 Vict. c. 71, s. 40.

CHAPTER XXI.

PUNISHMENT.

Punishment. THE object of the sentence is to prescribe the punishment. In almost every case the law, whether common law or statute law, which assigns the punishment, gives the judge a certain latitude as to the amount of punishment. Though he is restricted as to the maximum, in almost every case he can give as little as he pleases, the minimum punishments, which were formerly provided for many felonies, having been abolished by statute (*a*). On conviction for treason or murder, however, sentence of death must be passed (*b*).

Minimum
punishments
abolished.

Probation of
First Offenders
Act, 1887.

It is provided by the Probation of First Offenders Act, 1887, that in any case where a person is convicted of larceny or false pretences, or any other offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, the court may, having regard to his youth and antecedents, or the trivial nature of the offence, or any extenuating circumstances under which it was committed, instead of sentencing him to any punishment, direct that he be released on his own recognizance, with or without sureties, to come up for judgment if called upon, and to be of good behaviour. The court may also in such a case direct the offender to pay the costs of the prosecution (*c*).

Usual punish-
ment for
felonies.

The punishment prescribed by statute for *felonies* is usually penal servitude for not less than three years, or

(*a*) 9 & 10 Vict. c. 24 ; v. also 54 & 55 Vict. c. 69, s. 1.

(*b*) v. p. 269 for two other offences which remain capital.

(*c*) 50 & 51 Vict. c. 25, s. 1.

imprisonment not exceeding two years, with or without hard labour. When the punishment is not prescribed by any statute specially relating to the particular felony in question, such felony may be punished by penal servitude for not more than seven nor less than three years, or by imprisonment for any term not exceeding two years (a).

The punishment prescribed by statute for *misdemeanors* is usually fine or imprisonment, or both ; and it is also the same when it is not prescribed by statute, but left to the common law (b). The court may also require the defendant to find sureties to keep the peace and be of good behaviour. Usual punishment for misdemeanors.

The punishment for a felony (not punishable with death and not being simple larceny), after a previous conviction for felony, is penal servitude for life or for not less than three years, or imprisonment not exceeding four years (c). Punishment after previous conviction.

Special enactments impose certain terms of punishment in the case of conviction for *simple larceny* after previous conviction for certain offences. The punishment for simple larceny, after previous conviction for felony, is penal servitude for from three to ten years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement, and in the case of a male under sixteen years of age, with or without whipping (d). For simple larceny, or any offence made punishable as simple larceny by the Larceny Act, after previous conviction for any indictable misdemeanor under the Larceny Act, the punishment is penal servitude for from three to seven years, or imprisonment as in the last case, and if a male under sixteen years of age, with or without whipping (e). The same limits of punishment apply to simple larceny, or an offence punishable as simple larceny, after two summary convictions for offences punishable upon summary conviction under certain enumerated Acts (f). Simple larceny after previous conviction.

(a) 7 & 8 Geo. 4, c. 28, s. 8 ; 20 & 21 Vict. c. 3, s. 2 ; 54 & 55 Vict. c. 69, s. 1. (b) As to hard labour, v. p. 457.

(c) 7 & 8 Geo. 4, c. 28, s. 11 ; 20 & 21 Vict. c. 3, s. 2 ; 54 & 55 Vict. c. 69, s. 1. See also *R. v. Horn*, 48 L. T. (N.S.) 272. See also as to subjecting the person convicted to police supervision, p. 459, *post*.

(d) 24 & 25 Vict. c. 96, s. 7. (e) *Ibid.* s. 8. (f) *Ibid.* s. 9.

Uttering, &c.,
counterfeit
coin after
previous
conviction.

For uttering, &c., counterfeit coin, after previous conviction for such crime, or previous conviction for a felony against a Coinage Act, the punishment is penal servitude for life, or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, or solitary confinement (*a*).

Several terms
of punishment
concurrent or
continuous.

We may notice here that if the prisoner is found guilty of several distinct offences on different counts, he may be sentenced to several terms of imprisonment; which terms may either be concurrent, or the second commence at the expiration of the first (*b*). When a sentence for felony is passed on a person already suffering imprisonment for another crime, the court may order the imprisonment for the subsequent offence to commence at the expiration of the former term; so also the court may order a sentence of penal servitude to commence after the previous imprisonment or penal servitude, although the aggregate term of imprisonment or penal servitude respectively may exceed the term for which either of these punishments could be otherwise awarded (*c*).

Sanctions of
the law
enumerated.

The punishments which the law prescribes are the following:—

Death; Penal Servitude; Imprisonment; Fine.

Incidental to the imprisonment are sometimes

Hard Labour; Whipping.

In addition to other punishment there is power in certain cases to order that the person convicted be under police supervision for a certain time.

Again, in some cases the ends of justice are attained by requiring the prisoner to enter into recognizances to come up for judgment if called upon; which generally means that if he conducts himself with propriety he will hear nothing more of the matter.

(*a*) 24 & 25 Vict. c. 99, s. 12.

(*b*) *R. v. Castro*, L. R. 5 Q. B. D. 490; Warb. L. C. 242.

(*c*) 7 & 8 Geo. 4, c. 28, s. 10.

The prisoner may also be required to find sureties to **keep** the peace, and be of good behaviour.

Youthful offenders, under certain circumstances, may **be** sent to reformatories or industrial schools.

Special provision has recently been made for the **detention** in inebriate reformatories of criminals who are **habitual** drunkards.

Each of the above-named sanctions of the law will in **turn** receive a brief notice.

Death.—This is the only punishment which can be **Death.**
awarded in treason and murder. And it cannot be
awarded in any other cases (*a*) except piracy with vio-
lence, or the two crimes of setting fire to Her Majesty's
vessels of war, or military or naval stores, or to ships, &c.,
in the port of London (*b*).

Penal Servitude.—This mode of punishment was intro- **Penal servi-**
duced in substitution for transportation beyond the seas **tude.**
in certain cases by 16 & 17 Vict. c. 99, and totally
superseded the sentence of transportation by 20 and 21
Vict. c. 3. It was placed generally on the same footing
as the latter punishment: thus, any person who might
formerly have been sentenced to transportation is now
liable to be kept in penal servitude for the second period;
and any person who might have been sentenced either to
transportation or imprisonment may now be sentenced
either to penal servitude or imprisonment. But in cases
where before the Act sentence of seven years' transport-
ation might have been passed, the court may now pass
sentence of not less than three years' penal servitude (*c*).

Persons sentenced to penal servitude may, however, **Place of**
still be confined in any prison in the United Kingdom, **confinement**
in penal
servitude.

(*a*) *i.e.*, by an ordinary court of criminal jurisdiction, but as to the power of courts martial to pronounce sentence of death in certain cases of mutiny and desertion, v. pp. 51, 53.

(*b*) As to these offences, v. p. 269. As to recording sentence, v. p. 444. As to mode of execution, v. p. 472.

(*c*) 20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1.

or in Her Majesty's dominions beyond the seas, as one of Her Majesty's Secretaries of State may direct. And in other respects, as to custody, hard labour, management, control, and punishment for unlawfully being at large before the expiration of their term, they may be dealt with as persons sentenced to transportation formerly were (*a*).

The shortest term of penal servitude which can be given is three years, and that term may now be awarded in every case in which the court has power to pass a sentence of penal servitude (*b*).

Imprisonment. *Imprisonment.*—With regard to statutory offences, as a general rule no longer sentence of imprisonment than for two years can be awarded. But under some statutes still in force, imprisonment to the extent of three, or four, or even more years may be awarded, for example, under 24 & 25 Vict. c. 98, s. 11; 7 Wm. 4 and 1 Vict. c. 36, s. 26; 2 Geo. 2, c. 25, s. 2; 7 & 8 Geo. 4, c. 28, s. 11. As to the division into three classes of persons sentenced to imprisonment without hard labour, having regard to the nature of their offences and their antecedents, see 61 & 62 Vict. c. 41, s. 6.

Fine. *Fine.*—Where indictable offences are punishable by fine the amount of the fine is not usually restricted by statute. The reason of this is obvious. Not only does the value of money change from time to time, but a fine which would be ruin to one man would be matter of indifference to another (*c*). The Bill of Rights provides that excessive fines shall not be imposed. It would be imprudent to hinder a man from getting his livelihood; and if the crime demands more severe punishment, the court may award imprisonment, for it is generally empowered to award either the one or the other, and frequently both. Felonies are very rarely punished by mere fine (*d*). Each of the Criminal Con-

(*a*) 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3.

(*b*) 54 & 55 Vict. c. 69, s. 1.

(*c*) 4 Bl. 378.

(*d*) v. 24 & 25 Vict. c. 100, s. 5 (manslaughter).

consolidation Acts, 1861, provides that a person convicted of a *misdemeanor* under those Acts may be fined in addition to or in lieu of other punishment (a).

Hard Labour.—This punishment may be added, in Hard labour. nearly all cases, to imprisonment for *felony*. Certain *misdemeanors* to the imprisonment for which hard labour may be added, are enumerated in 3 Geo. 4, c. 114, and 14 & 15 Vict. c. 100, s. 29. In every case in which there is power to pass a sentence of penal servitude, the court may, in its discretion, award imprisonment with hard labour for any term not exceeding two years (b). In offences under the Post Office Acts, for which imprisonment may be awarded, the court may add hard labour (c), and in offences against the Criminal Law Amendment Act, 1885. So that now in nearly every case hard labour may accompany imprisonment.

Where a fine, or imprisonment with hard labour, can be inflicted for an offence, a court of summary jurisdiction has power to award imprisonment with hard labour in default of payment of the fine (d).

Whipping.—Two classes of cases in which whipping Whipping: is allowed must be distinguished:—(i) of males below the age of sixteen; (ii) of males of any age. It should be premised that a female can now in no case be whipped, though at one time such a sentence was a common one. Where formerly sentence of whipping might be passed, the court or magistrate may now order the female to be kept to hard labour for a term not exceeding six months nor less than one month, in lieu of the whipping (e).

i. By three of the Consolidation Acts whipping may in case of juvenile offenders; be inflicted for a variety of specified offences committed

(a) 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71.

(b) 54 & 55 Vict. c. 69, s. 1.

(c) 7 Wm. 4 & 1 Vict. c. 36, s. 42.

(d) *R. v. The Justices of Tynemouth*, L. R. 16 Q. B. D. 647; 55 L. J. (M.C.) 181; 54 L. T. (N.S.) 386.

(e) 1 Geo. 4, c. 57, s. 2.

by males under the age of sixteen, and in one case, males under the age of eighteen (*a*). It is to take place once, and the number of strokes and the instrument with which they are to be inflicted are to be specified by the court in the sentence (*b*). By the Criminal Law Amendment Act, 1885, a youth under the age of sixteen years who is convicted of having, or attempting to have, carnal knowledge of any girl under thirteen years of age, may be sentenced to a whipping instead of to a term of imprisonment.

When this punishment is awarded by magistrates in the exercise of their summary jurisdiction (*c*), the sentence must specify the number of strokes and the instrument; and in the case of an offender whose age does not exceed fourteen, the number of strokes must not exceed twelve, and the instrument used must be a birch rod. And for a child under the age of twelve the number of strokes must not exceed six. The offender must not be whipped more than once for the same offence (*d*).

in case of
males of any
age.

ii. Whipping once, twice, or thrice may be awarded to males of any age in case of—

Robbery, &c., with violence—or an attempt to choke, suffocate, or strangle (*e*). The following regulations must be observed : (*a*) The whipping must be privately inflicted; (*β*) if the age of the offender does not exceed sixteen, the number of strokes at each whipping must not exceed twenty-five, and the instrument must be a birch rod; (*γ*) in other cases not more than fifty strokes at a whipping; (*δ*) the court must specify the number of strokes and the instrument; (*ε*) the whipping must not take place after six months from the sentence; (*ζ*) in the case of a person sentenced to penal servitude, the whipping

(*a*) 24 & 25 Vict. c. 96, s. 101.

(*b*) *Ibid.* s. 119; c. 97, s. 75; c. 100, s. 70.

(*c*) As to which v. pp. 478, 479.

(*d*) 25 & 26 Vict. c. 18; 42 & 43 Vict. c. 49, s. 10, 11.

(*e*) As to these cases, v. pp. 182, 216.

must be inflicted before he is removed to a convict prison (a).

Police Supervision.—When any person is convicted on an indictment of a *crime* (explained by the Act to mean in England—any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining by false pretences, or of conspiracy to defraud, or of any misdemeanor under 24 & 25 Vict. c. 96, s. 58 (b)), and a previous conviction of a crime is proved against him, the court may, in addition to any other punishment, direct that he is to be subject to the supervision of the police for a period of seven years or less, commencing immediately after the expiration of the sentence passed on him for the last of such crimes (c). Police supervision.

The consequence of such sentence is that the person to be supervised must notify the place of his residence to the chief officer of police of the district in which his residence is situated, or to the constable or person in charge of the chief office, or of the office or station to which he has received notice to report himself; and if he is about to go out of the district, he must notify the change to such officer or constable in the district he is leaving, and also to such officer or constable in the district to which he is going. If a male he must report himself to the police personally or by letter, as required, once a month. If he offends against these regulations, he is subject to imprisonment with or without hard labour for a term not exceeding one year, unless he can show that he did his best to act in conformity with the law (d). What it consists in.

Recognizances and Sureties.—Under each of the Criminal Consolidation Acts, in case of conviction for an indictable misdemeanor punishable under those Acts, the court may Entering into recognizances and finding sureties.

(a) 26 & 27 Vict. c. 44. There are certain other offences for which whipping may be inflicted (as, *e.g.*, upon incorrigible rogues, 5 Geo. 4, c. 83, s. 10), but in practice this punishment is not now inflicted on adults, except in the case mentioned in the text. (b) v. p. 252.

(c) 34 & 35 Vict. c. 112, s. 8.

(d) *Ibid.* 42 & 43 Vict. c. 55, s. 2; 54 & 55 Vict. c. 69, s. 4.

fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour, in addition to or in lieu of any other punishment. In case of a *felony* punishable under the Acts, the court may order him to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any other punishment. But under these clauses no one may be imprisoned for not finding sureties for any period exceeding one year (*a*).

Reformatories. *Reformatory and Industrial Schools.*—When any offender who, in the judgment of the court or magistrates, is under the age of sixteen years, is convicted of an offence punishable by imprisonment, and either appears to the court to be not less than twelve years of age, or is proved to have been previously convicted of an offence punishable by imprisonment, the court may, in addition to or in lieu of any other sentence, order him to be sent to a certified *reformatory* school, to be there detained for a period of from three to five years. But the period must be such as to expire at or before the youth attains nineteen years of age. The court sending such a youthful offender to a school will choose one of his apparent religious persuasion (*b*).

Industrial schools.

Industrial schools meet the case of those who have not to so great an extent fallen into crime, but are on the highway to it. Thus, two magistrates may send the following, among others, to such schools: children apparently under the age of *fourteen* begging or receiving alms, or being in a street or public place for the purpose of begging or receiving alms; or found wandering, not having any home or settled place of abode or visible means of existence; or, who frequent the company of reputed thieves; or are found destitute, either being

(*a*) 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71.

(*b*) 29 & 30 Vict. c. 117, s. 14; 56 & 57 Vict. c. 48. If he behaves well the managers of the institution may apprentice him or assist him to emigrate even though his term of detention may not have expired, 54 & 55 Vict. c. 23.

orphans, or having a surviving parent in penal servitude or imprisonment (a); or, lodging, living, or residing with common or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution (b). This even applies to the case of a child living in a house frequented by prostitutes, although the child be living there with its mother, who is not a prostitute, and the consent of the mother to the child's removal is not necessary (c). Again, children apparently under the age of *twelve*, charged with an offence punishable by imprisonment or less punishment, but not having been convicted of felony, may be sent to such a school. No child is detained in such school after he has attained the age of sixteen, unless with his own consent expressed in writing (d); but he nevertheless remains, until he attains the age of eighteen, under the supervision of the managers of the school, and they may recall him to the school for a period of not more than three months at any one time if they are of opinion that it is necessary for his protection to be so recalled (e). Magistrates have also power where an attendance order, made under sect. 11 of the Elementary Education Act, 1876, is not complied with without any reasonable excuse, to order the child to be sent to an industrial school (f).

Instead of sending the child to an industrial school the magistrates may, if they think fit, make an order, under the Prevention of Cruelty to Children Act, 1894, committing him to the custody of a relation or some other person, and providing for his maintenance (g).

Criminal habitual drunkards.—Where a person is convicted on indictment of an offence punishable with imprisonment, if the Court is satisfied that the offence was committed under the influence of, or was contributed to

(a) 29 & 30 Vict. c. 118; s. 14.

(b) 43 & 44 Vict. c. 15, s. 1.

(c) *Hiscocks v. Jermonson*, L. R. 10 Q. B. D. 360; 52 L. J. (M.C.) 42; 48 L. T. (N.S.) 225; 31 W. R. 656.

(d) 29 & 30 Vict. c. 118, s. 41.

(e) 57 & 58 Vict. c. 33.

(f) 39 & 40 Vict. c. 79, s. 12.

(g) 57 & 58 Vict. c. 41, s. 9; as to such orders, see p. 186.

by drink, and the offender admits that he is or is found by the jury to be a habitual drunkard, the Court may in addition to or substitution for any other sentence, order him to be detained for a term not exceeding three years in an inebriate reformatory. The indictment should allege, after charging the offence, that the accused is a habitual drunkard, and if he is found guilty of the offence, the jury are then to be charged to inquire whether he is a habitual drunkard. But unless evidence of the habitual drunkenness has been given before the committing magistrate, seven days' notice must be given to the accused and to the officer of the court that habitual drunkenness will be charged in the indictment. There is a somewhat similar provision as to persons who are repeatedly convicted summarily of drunkenness (a).

Other Consequences of Conviction.

Forfeiture, &c. Formerly certain forfeitures and other consequences followed on conviction for treason or felony. But by statute (b) it has been provided that from and after the passing of the Act (July 4, 1870) no confession, verdict, inquest, conviction, or judgment of or for any treason, felony, or *felo de se*, shall cause any *attainder*, or *corruption of blood*, or any *forfeiture*, or *escheat*; provided that nothing in the Act shall affect the law of forfeiture consequent upon outlawry. Of course this does not refer to, or interfere with, any fine or penalty imposed in the sentence (c).

Deprivation of office, &c.

But a conviction for treason or felony for which the sentence is death, penal servitude, or imprisonment with hard labour or exceeding twelve months, determines the tenure of any military or naval office, or any civil office under the Crown, or other public employment or any ecclesiastical benefice, or any office or emolument in any university or other corporation, or any pension or superannuation allowance payable by the public, or out of the

(a) 61 & 62 Vict. c. 60, s. 1.

(b) 33 & 34 Vict. c. 23, s. 1.

(c) *Ibid.* s. 5.

public funds, unless a pardon is received within two months after the conviction, or before the filling up of the office, place, &c., if given at a later period. It also disqualifies for the future, until the punishment has been suffered or pardon received, the felon from holding any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or being elected, or sitting, or voting as a member of either House of Parliament, or from exercising any right of suffrage or other parliamentary or municipal franchise within England, Wales, or Ireland (a).

As to the *property* of the felon.—By the same statute (b) Property of a felon after conviction. it is provided that this may be committed to the custody and management of an administrator, to be appointed by the Crown; or in default of such appointment, to the management of an *interim* curator, who may be appointed by the magistrates on an application made in the interest of the felon or his family. The administrator or curator must pay his debts and liabilities, and support his family, and preserve the residue of the property for the felon himself or his representatives on the completion of his punishment, his pardon, or his death.

Persons convicted of treason or felony may be condemned in *costs*; and if convicted of felony may be ordered Costs and compensation. to pay a sum of money not exceeding £100, as compensation for any loss of property suffered by any person through or by means of the felony (c).

(a) 33 & 34 Vict. c. 23, s. 2.

(b) *Ibid.* ss. 9, 18, 21. This does not apply to property vested in the convict as trustee or mortgagee, 56 & 57 Vict. c. 53, s. 48.

(c) 33 & 34 Vict. c. 23, ss. 3, 4.

CHAPTER XXII.

PROCEEDINGS AFTER TRIAL.

Verdict, when it does not take effect.

THOUGH there is no appeal on the merits in a criminal case, the verdict of the jury does not always finally determine the conviction or acquittal of the prisoner. We have already seen (a) that judgment may be arrested on certain grounds. It remains to consider those cases in which the judgment, though actually given, is subsequently affected. This will be treated of under the heads of New Trial, Reversal of Judgment by Writ of Error, and the Court for Crown Cases Reserved. The subject of Reprieve and Pardon will form a separate chapter.

NEW TRIAL.

New trial, in what cases granted.

In criminal cases there is no power, after a verdict has been returned, to grant a new trial, unless the indictment was preferred in the Queen's Bench Division, or removed into that court by certiorari, and then only in cases of *misdeemeanor* (b). And even in such cases, as a general rule, no new trial will be granted where the defendant has been *acquitted* upon a charge which would have involved him in the danger of imprisonment if he had been convicted (c), unless the acquittal was obtained by the defendant keeping back the witnesses for the prosecution.

In cases where there is power to grant a new trial it may be applied for upon the same grounds as in civil

(a) v. p. 443.

(b) *R. v. Bertrand*, L. R. 1 P. C. 520 ; 36 L. J. (P.C.) 51 ; *R. v. Murphy*, L. R. 2 P. C. 535 ; 38 L. J. P. C. 53.

(c) *R. v. Duncan*, L. R. 7 Q. B. D. 198 ; 50 L. J. (M.C.) 94 ; 44 L. T. 511 ; Warb. L. C. 274. See Short and Mellor's Crown Office Practice, p. 251.

cases, as misdirection by the judge, misreception of evidence, or that the verdict was wholly against the weight of the evidence (*a*), or for gross misbehaviour of the jury, or for surprise, or for any other cause, where it shall appear to the court that a new trial will further the ends of justice (*b*).

It is only in case of some irregularity in the proceedings, or, in other words, a mis-trial, as, *e.g.*, if the jury had not been duly sworn, or if one of them had, after retiring, discussed his verdict with a stranger, that any other court than the Queen's Bench can order a new trial to take place, the mis-trial being regarded as a mere nullity (*c*); and in a case of felony no such order can be made, except upon the ground of defect of jurisdiction, or that the verdict was ambiguous (*d*).

New trial, by whom granted.

The motion for a new trial is made upon the judge's notes of the trial, or upon affidavit. A rule *nisi* is only granted in the first instance. When counsel have been heard on both sides, the defendant being in court, the court either makes the rule absolute or discharges it, with or without costs.

New trial, how obtained.

REVERSAL OF JUDGMENT BY WRIT OF ERROR (*e*).

As a rule, the only way in which judgment can be reversed is by writ of error, though such writ is not necessary if the objection is to some matter *dehors* or foreign to the record, as if judgment be given by persons who have no authority.

Reversal of judgment.

A writ of error is a writ directed to an inferior court of record which has given judgment against the defendant, requiring it to send up the record and proceedings of the indictment in question to the Queen's Bench Division, for that court to examine whether the errors alleged existed, and to affirm or reverse the

Writ of error.

(*a*) *R. v. Berger*, L. R. [1894], 1 Q. B. 823; 63 L. J. Q. B. 529; 70 L. T. 807; 42 W. R. 541.

(*b*) 1 Chit. Crim. Law, 655, 656.

(*c*) *Ibid.* 653.

(*d*) *v. R. v. Murphy*, L. R. 2 P. C. at p. 548.

(*e*) As to the practice with regard to writ of error, see Crown Office Rules, 1886, rr. 183-215.

judgment of the inferior court. It must be grounded on some substantial defect apparent on the face of the record, as if the indictment be bad in substance, or the sentence be illegal. It will never be allowed for a formal defect (*a*). The following are examples of cases where it has been held that a writ of error will lie: in perjury, where the court has not competent authority to administer the oath; in libel, if the words do not appear to be libellous; in false pretences, if it is not shown what the false pretences were (*b*).

Proceedings on
writ of error.

Before suing out the writ of error, it is necessary to obtain the fiat of the Attorney-General (*c*) on showing reasonable ground of error. This is at the discretion of the Attorney-General, but is not generally refused; indeed, in misdemeanors, it is granted almost as a matter of course upon a certificate signed by the prisoner's counsel, and also, if error in fact be alleged, an affidavit being submitted to the Attorney-General. The writ is delivered to the clerk of the peace, or other officer of the court to which it is directed, who has the custody of the indictment. He makes up the record and makes out the return to the court. The party suing assigns his errors. The Crown joins in error. The case is argued, and judgment of affirmance or reversal given. The court of error may either pronounce the proper judgment itself, or remit the record back to the inferior court, in order that the latter may pronounce judgment (*d*).

Judgment
affirmed.

If judgment is affirmed, the defendant may be once committed to prison; and if he does not surrender within four days, a judge may issue a warrant for his apprehension (*e*).

Judgment
reversed.

If judgment is reversed, all the former proceedings are null and void, and the defendant is in the same position as if he had never been charged with the offence, therefore he may be indicted again on the same ground (*f*).

(*a*) v. 14 & 15 Vict. c. 100, s. 25.

(*b*) v. Arch. 218.

(*c*) Crown Office Rules, 1886, r. 184.

(*d*) 11 & 12 Vict. c. 78, s. 5.

(*e*) Crown Office Rules, 1886, r. 204.

(*f*) *R. v. Drury*, 3 C. & K. 193; 18 L. J. M. C. 189; Arch. 226.

In the interval before the result of the proceedings in error is known, in cases of misdemeanor the defendant is discharged from custody on entering into the recognizances with sureties required by the Act mentioned below ; in felonies he remains in custody (*a*).

Interval before judgment in error.

The jurisdiction in error in criminal cases is thus regulated by the Supreme Court of Judicature Acts : On a judgment of the High Court of Justice (including the Queen's Bench Division, commissions of gaol delivery and oyer and terminer), an appeal by way of writ of error lies to the Court of Appeal, if there is some error of law apparent on the face of the record, as to which no question has been reserved under 11 & 12 Vict. c. 78, or under 20 & 21 Vict. c. 43. But with that exception, in no case does an appeal lie from the High Court or any of its Divisions in any criminal cause or matter (*b*). In those cases where a writ of error lies to the Court of Appeal there is a further appeal to the House of Lords (*c*).

The Supreme Court of Judicature Acts and error.

As to appeals from quarter sessions (*d*) and other inferior courts, which might have been brought to any court or judge whose jurisdiction is transferred to the High Court of Justice, it is provided that they may be heard and determined by divisional courts of the High Court (*e*).

COURT FOR CROWN CASES RESERVED.

If any person is convicted of treason, felony, or misdemeanor, the court (whether a judge at the assizes, or the justices or recorder at the quarter sessions) may reserve any question of law which may have arisen on the trial for the consideration of the Court for Crown Cases Reserved (*f*). Such court consists of the judges of

Crown cases reserved.

(*a*) 8 & 9 Vict. c. 68, s. 1 ; 9 & 10 Vict. c. 24, s. 4.

(*b*) 36 & 37 Vict. c. 66, ss. 18, 19, 47 ; 38 & 39 Vict. c. 77, s. 19 ; v. also *ex parte Woodall*, L. R. 20 Q. B. D. at p. 835 ; *R. v. Barnardo*, L. R. 23 Q. B. D. at p. 308.

(*c*) 39 & 40 Vict. c. 59, ss. 3, 4, and 10.

(*d*) As to these appeals, v. p. 302.

(*e*) 36 & 37 Vict. c. 66, s. 45 ; 57 & 58 Vict. c. 16, ss. 1, 2.

(*f*) 11 & 12 Vict. c. 78, s. 1.

the High Court of Justice, or five of them at least, of whom the Lord Chief Justice of England must be one (*a*).

Interval before
decision.

The judge reserving the point may respite execution of the judgment on such conviction, or postpone the judgment until the question is decided. And in either case, to secure the appearance of the defendant when he is required, the court will, in its discretion, either commit him to prison or take a recognizance of bail with one or two sureties (*b*). The judge states the facts and the question of law which has arisen in the form of a case, which is then transmitted to the court above mentioned.

Proceedings in
the Court for
Crown Cases
Reserved.

The Court for Crown Cases Reserved hears counsel on either side, the counsel for the prisoner beginning and having a reply. If counsel do not appear at all the Lord Chief Justice reads the case, and then judgment is pronounced. The judgment is that the court reverses, affirms, or amends the judgment of the court reserving the point ; or avoids such judgment and orders an entry to be made on the record that, in the opinion of the Court for Crown Cases Reserved, the party convicted ought not to have been convicted ; or orders judgment to be given at some other assizes or sessions if no judgment has been given up to that time ; or makes such other order as justice requires. The order of the court, whether for execution of judgment or discharge of the prisoner, is carried out by the sheriff or gaoler in whose custody the person convicted is ; to whom a certificate of such order is transmitted by the clerk of the assize, or of the peace (*c*). The court may send the case back for amendment ; and after that has been effected, judgment will be delivered (*d*).

No appeal.

The determination of any such question in the manner indicated above is final and without appeal (*e*).

(*a*) 11 & 12 Vict. c. 78, s. 3 ; 44 & 45 Vict. c. 68, s. 15.

(*b*) 11 & 12 Vict. c. 78, s. 1.

(*c*) *Ibid.* s. 2.

(*d*) *Ibid.* s. 4.

(*e*) 36 & 37 Vict. c. 66, s. 47.

CHAPTER XXIII.

REPRIEVE AND PARDON.

A REPRIEVE (*reprendre*) is the withdrawing of a sentence Reprieve: for an interval of time; whereby the execution of a criminal is suspended (*a*).

Reprieves may be granted either :—

i. By the *Crown* (*ex mandato regis*) at its discretion; by Crown its pleasure being signified to the court by which execution is to be awarded.

ii. By the *court* empowered to award execution, either by court. before or after verdict (*ex arbitrio judicis*). Generally it must be guided by its own discretion, as to whether substantial justice requires it. But in two cases the court is bound to grant a reprieve. (*a*) When a woman sentenced to death is ascertained to be pregnant. To discover whether she is *quick* with child a jury of twelve matrons is empanelled. If so found, she is reprieved until either she is delivered or proved by the course of nature not to have been with child at all. But after she has been once delivered, she cannot be reprieved on this ground a second time. (*b*) When the prisoner becomes insane after judgment (*b*). We have already seen that the occurrence of insanity in the prisoner is a stay to proceedings at any stage.

Pardon.—The exercise of the prerogative of pardon- Pardon. ing is at the absolute discretion of the sovereign. If, either from the opinion of the judge, or for any other reason, the Home Secretary thinks the case a fit one

(*a*) 4 Bl. 394.

(*b*) Arch. 206.

for the interposition of royal mercy, he recommends the same to the Queen, and she acts on the recommendation.

Pardon, when it cannot be granted.

The sovereign cannot pardon where private interests are principally concerned in the prosecution of offenders "*non potest rex gratiam facere cum injuria et damno aliorum*"—for example, a common nuisance cannot be pardoned while it remains unredressed. But it is provided (*a*) that the sovereign may remit penalties, although they may be wholly or in part payable to some other than the Crown (*b*). There is another case in which the offender cannot be pardoned, namely, when he is guilty of the offence of committing a man to prison out of the realm (*c*). It should also be noticed that a pardon cannot be pleaded to an impeachment so as to stifle the inquiry (*d*). But the person impeached and sentenced may be afterwards pardoned.

How made out and how construed.

A pardon must be by warrant under the great seal, or under the sign manual. As a rule, it is to be taken most beneficially *for* the subject and *against* the Queen (*e*).

Conditional pardon.

A pardon may be *conditional*—the most frequent example of which is when a person sentenced to death is pardoned on the condition that he submit to punishment either of penal servitude or imprisonment (*f*).

The effect of a pardon (subject to any conditions upon which it may be granted) is to absolve the person pardoned from all punishment due to the offence, and from all disqualifications and forfeitures which he may have incurred in consequence of the conviction (*g*).

Ticket of leave.

Ticket of leave.

In connection with the subject of pardon, it will be

(*a*) 22 Vict. c. 32.

(*b*) See also 24 & 25 Vict. c. 96, s. 109; c. 97, s. 67.

(*c*) 31 Car. 2, c. 2.

(*d*) 12 & 13 Wm. 3, c. 2, s. 12.

(*e*) See further 4 St. Bl. 449.

(*f*) v. 5 Geo. 4, c. 84; 20 & 21 Vict. c. 3.

(*g*) *Hay v. Justices of Tower Division*, L. R. 24 Q. B. D. 561; 59 L. J. (M.C.) 79; 62 L. T. 290; 38 W. R. 414; 54 J. P. 500.

convenient to notice the case of those who are allowed to be at large before the expiration of their term of confinement.

When any person is sentenced to penal servitude or imprisonment, the Queen, by order in writing under the hand and seal of the Secretary of State, may grant him a *licence to be at large* in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of the term of penal servitude or imprisonment, and upon such conditions as Her Majesty thinks fit. But the licence may be revoked or altered at the Queen's pleasure. It will be forfeited in the event of (a) a subsequent conviction for an indictable offence; (b) of failure to report himself to the police, unless prevented by unavoidable cause; (c) of changing residence without due notification. On the subsequent conviction the offender will first suffer the punishment attached to such offence, and then finish his original term, the judge having no power to direct the new sentence to run concurrently with the remainder of the original term (a). If the licence is revoked, the convict may be apprehended and sent back to prison.

Certain offences connected with these licences subject the holders to imprisonment for a term not exceeding three months, on summary conviction. The holder of a licence suspected of committing an offence may be apprehended without a warrant (b).

In the case of those sentenced to penal servitude, the remission of a part of the term, proportioned to the number of years contained in the sentence, follows as a matter of course if the convict conducts himself well. But if the sentence is penal servitude for life, the special order of one of the Secretaries of State is required.

(a) *R. v. King*, L. R. [1897], 1 Q. B. 214; 66 L. J. (Q.B.) 87; 75 L. T. 392; 61 J. P. 329; per Hawkins, J.

(b) 16 & 17 Vict. c. 99, ss. 9-11; 20 & 21 Vict. c. 3, s. 5; 27 & 28 Vict. c. 47, ss. 4-10; 34 & 35 Vict. c. 112, ss. 3-5; 54 & 55 Vict. c. 69, ss. 2-6.

CHAPTER XXIV.

EXECUTION.

Execution. EXECUTION is carried out by the sheriff or his deputy, thus giving effect to the sentence of the judge. It is the usage for the judge, at the end of the assizes, to sign the calendar containing the prisoners' names and sentences. This is left to the sheriff as his warrant and authority; and if he receive no special order to the contrary, he executes the judgment therein contained.

Time and place. The criminal is usually executed about a fortnight or three weeks after his sentence. An execution for murder must take place within the walls of the prison in which the offender is confined at the time (*a*).

Manner. If the execution be not by the proper officer, or if not carried out in strict conformity with the sentence, as if the criminal is beheaded instead of hanged, the official is guilty of murder (*b*). If the criminal survives, he must be hanged again, inasmuch as the sentence is that he be hanged by the neck till he is dead.

(*a*) 31 & 32 Vict. c. 24, s. 2.

(*b*) 3 Inst. 52.

BOOK IV.

SUMMARY CONVICTIONS.

A CERTAIN class of convictions are described as “summary” to distinguish them from such as follow after a regular trial on an indictment or information. The essence of summary proceedings is the absence of the intervention of a jury; the person accused being acquitted or condemned by the decision of the person who is instituted judge. Blackstone viewed with apprehension the extension of this mode of proceeding which threatened the disuse of trial by jury. The tendency still exists “to multiply classes of crimes which entail the lowest order of punishment, and require for investigation the lowest rank of judicial tribunals” (a). Summary convictions.

The only class of summary proceedings which is to be dealt with in this chapter is by far the most extensive and important—*Summary convictions before magistrates out of Quarter Sessions* (b).

The original functions of justices of the peace, when not in general or quarter sessions, were chiefly to prevent breaches of the peace and to cause offenders to be apprehended. But their jurisdiction has been gradually extended. A great number of minor offences can be dealt with satisfactorily without the expense and delay of bringing them before the ordinary courts. Accordingly Jurisdiction of magistrates, how enlarged.

(a) Amos' Jurisprudence, 303.

(b) We have already noticed a form of summary proceeding in the event of contempt of court (v. p. 90). Another class comprises the proceedings before commissioners of Inland Revenue; but there is no need to enter into the details of this subject. v. 15 & 16 Vict. c. 61.

Punishments.

from time to time authority has been conferred by statute on the magistrates to examine into such offences and punish the offenders. It is only in virtue of legislative enactments that they act in this capacity. In some cases the offenders are punished merely by the infliction of a pecuniary penalty. In other cases the magistrates are empowered to punish by a penalty or imprisonment with hard labour not exceeding six months ; or, if there has been a previous conviction, twelve months^(a). And in any case where a person has been, on summary conviction, ordered to pay a penalty, on his failure to do so he may be committed to prison for a period depending on the amount of the penalty : but in no case exceeding three months^(b).

Power of mitigating punishment.

Instead of inflicting the punishments attached to the particular offences, a court of summary jurisdiction has now a general power where it thinks that, though the charge is proved, the offence is in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, either :—

(a) Without proceeding to conviction, to dismiss the information : and, if the court thinks fit, to order the person charged to pay such damages, not exceeding forty shillings, and such costs of the proceeding, or either of them, as the court thinks reasonable ; or (b) upon conviction of the person charged, to discharge him conditionally on his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the court thinks reasonable.

(a) As, *e.g.*, under 24 & 25 Vict. c. 96, s. 33, 34 ; v. p. 285 as to the power of justices under 34 & 35 Vict. c. 112, s. 7. to sentence suspected persons twice previously convicted to twelve months imprisonment.

(b) 42 & 43 Vict. c. 49, ss. 4 and 5. It will be remembered that under the Probation of First Offenders Act (as to which v. p. 452) the court has in certain cases power to discharge a person who has not been previously convicted, upon his entering into recognizances to come up for judgment if called upon.

This general power does not, however, apply to the case of an adult pleading guilty to a charge of an offence over which the court of summary jurisdiction would not have had jurisdiction but for the plea of guilty (*a*).

When the court deals with an indictable offence summarily and dismisses the information or convicts, the effect of such dismissal or conviction is the same as if the person charged had been acquitted or convicted respectively on indictment (*b*). And the conviction or certificate of dismissal is a bar to further proceedings for the same offence (*c*). Effect of the court's judgment.

The jurisdiction of a magistrate is local, and not personal; that is, he can exercise it only in his own county, borough, or other district. And as a general rule, the jurisdiction is further limited to offences committed within such county, borough, or district. But by some statutes, the magistrates have jurisdiction if the offender resides or is apprehended in, or the goods are found in, the county, &c. (*d*). Local limitation of jurisdiction.

In some cases one justice may act by himself, in others the statute requires the presence of more. But Metropolitan police magistrates, City of London magistrates, and stipendiary magistrates have, within their jurisdiction, power in most cases to do alone whatever is authorised to be done by one or more justices (*e*). How many justices required.

The magistrates have no jurisdiction to hear and determine cases in a summary manner where the title to property is in question, though, if it had not been for such question, they would have had cognisance thereof; and where the act complained of was done by the defendant in the exercise of a *bonâ fide* claim or assertion of right, such claim of right being not on the face of it No jurisdiction where property or title in question.

(*a*) Summary Jurisdiction Act, 42 & 43 Vict. c. 49, s. 16.

(*b*) *Ibid.* s. 27.

(*c*) v. p. 368.

(*d*) For example, 57 & 58 Vict. c. 60, s. 684. As to offences committed near the boundaries of the jurisdiction of a court, v. 42 & 43 Vict. c. 49, s. 46. See also 44 & 45 Vict. c. 24.

(*e*) 42 & 43 Vict. c. 49, s. 20 (10); 11 & 12 Vict. c. 43, s. 33.

obviously absurd or unreasonable, the jurisdiction of the magistrates is ousted (*a*).

Right of trial
by jury.

When a person is charged with any offence (except assault) for which he is liable on summary conviction to imprisonment for more than three months, he may, before the charge is gone into (but not afterwards) claim to be tried by a jury; and thereupon the case will be treated as an indictable offence. Before the charge is gone into, he should be informed of his right of trial by jury, and asked if he desires such a trial. And in the case of a child similar information must be given to the child's parent or guardian, if present; and such parent or guardian has the right of claiming trial by jury (*b*).

The information that he has a right to be tried by jury must be given to the person charged even before he is called upon to plead, and if it is not given and he is convicted by the magistrates, even upon his own confession, the conviction will be quashed (*c*). If the prisoner elects to be tried by a jury it is not however necessary that the indictment should allege that he did so elect (*d*).

If a defendant does elect to be tried by a jury, and not summarily, he may (subject to the provisions of the Vexatious Indictments Act) be committed for trial and indicted for any offence disclosed by the depositions, although those offences were not charged in the summons (*e*).

We shall first notice some of the chief offences which have been made the subjects of summary proceedings, and then inquire into the nature of such proceedings.

(*a*) Paley, Sum. Conv. 144; *Scott v. Baring*, 64 L. J. (M.C.) 200; 72 L. T. 495; 18 Cox, C. C. 128.

(*b*) Summary Jurisdiction Act, 42 & 43 Vict. c. 49, s. 17. *Williams v. Wynne*, 57 L. J. (M.C.) 30; 58 L. T. (N.S.) 283.

(*c*) *R. v. Cockshott*, L. R. [1898], 1 Q. B. 582; 67 L. J. (Q.B.) 467; 78 L. T. 168; 62 J. P. 325.

(*d*) *R. v. Chambers*, 65 L. J. (M.C.) 214; 75 L. T. 76; 60 J. P. 586.

(*e*) *R. v. Brown*, L. R. [1895] 1 Q. B. 119; 72 L. T. 22; 64 L. J. (M.C.) 1; 43 W. R. 222.

As in some cases the limit of jurisdiction, and the extent of punishment which can be inflicted by courts of summary jurisdiction, differ according to the age of the persons accused, and in some cases jurisdiction exists only when the accused is under a certain age, it will be convenient to classify offences in accordance with these distinctions, and to treat of them in the following order :—

Offences
dealt with
summarily
classified.

1. Offences by children.
2. Offences by young persons as distinguished from adults.
3. Offences by adults as distinguished from young persons.
4. Common assaults.
5. Larcenies not indictable.
6. Small wilful injuries to property.
7. Offences relating to game.

It should be observed that the first three of these classes of offences comprise certain indictable offences which can be dealt with summarily on admission of guilt, or by consent of the accused, or in the case of children by consent of their parents or guardians. The remainder chiefly consist of offences which are punishable on summary conviction without the option of trial by jury.

For the purposes of the Summary Jurisdiction Act, 1879, a *child* is defined to be a person who, in the opinion of the court before whom he is brought, is under the age of twelve years. A *young person* is one who, in the opinion of the court, is over twelve and under sixteen years of age. And an *adult* is one who, in the opinion of the court, is over sixteen years of age (a).

Definition of
children and
young persons.

(a) 42 & 43 Vict. c. 49, s. 49.

1. *Offences by Children.*

Offences by
children.

When a child is charged with *any* indictable offence other than homicide before a court of summary jurisdiction, such court may, if they think it expedient, and if the parent or guardian of the child on being informed of the right of trial by jury does not object, deal summarily with the offence, and inflict the same description of punishment as might have been inflicted had the case been tried on indictment; except

that no sentence of penal servitude shall be given,
but imprisonment instead;

that imprisonment shall not exceed one month;
fine shall not exceed forty shillings;

that whipping may be inflicted on a male child
either in addition to or in substitution for any
other punishment (a).

And in no case may a child be imprisoned for more than one month, or fined more than forty shillings (b).

2. *Offences by Young Persons.*

Offences by
young persons.

When a young person is charged with any of *the following* indictable offences:—

(a) Simple larceny;

(b) Offences declared by statute to be punishable as simple larceny;

(c) Stealing from the person;

(d) Larceny as a clerk or servant;

(e) Embezzlement by a clerk or servant;

(f) Receiving stolen goods (*i.e.*, offences specified in 24 & 25 Vict. c. 96, ss. 91, 95);

(a) 42 & 43 Vict. c. 49, s. 10.

(b) *Ibid.* s. 15.

(g) Aiding, abetting, counselling or procuring the commission of any of the above offences ;

(h) Attempting to commit any of the above offences ;

(i) Offences with intent to endanger the safety of persons upon railways, &c., under 24 & 25 Vict. c. 100, ss. 32, 33 ;

(k) Offences with intent to injure railway engines, carriages, &c., under 24 & 25 Vict. c. 97, s. 35 ;

(l) Offences under the Post Office laws.

Such young person may, if he or she consent, and the court think it expedient, be dealt with summarily, and if found guilty, may be adjudged either to pay a fine not exceeding ten pounds, or to be imprisoned, with or without hard labour, for any term not exceeding three months ; and, if a male under the age of fourteen, to be whipped either in substitution for, or in addition to, any other punishment ; but this provision will not prevent the young person being sent to a reformatory or an industrial school (a).

3. *Offences by Adults* (as distinguished from young persons).

i. *Small Larcenies and Embezzlements*.—When an adult is charged with any of the following indictable offences : Simple larceny, offences punishable by statute as simple larceny, stealing from the person, larceny as a clerk or servant, receiving stolen goods, or aiding or abetting the commission of any of those offences, where the value of the whole of the property which is the subject of the alleged offence does not exceed forty shillings : or of an attempt to commit any of such offences irrespective of the value of the property—he may, if he consent, and the court think it expedient, be dealt with summarily. And on conviction he is liable to imprisonment, with or with-

Offences by
adults.
Larcenies, &c.

(a) 42 & 43 Vict. c. 49, s. 11. As to reformatories and industrial schools, v. p. 460.

out hard labour, for any term not exceeding three months, or to a fine not exceeding twenty pounds (a). But by electing to be dealt with summarily he loses his right of appeal to quarter sessions (b).

Larcenies to a greater value.

ii. *Larceny and Embezzlement of property above the value of forty shillings.*—When an adult is charged with any of the offences named in the last paragraph, and the value of the property which is the subject of the alleged offence exceeds forty shillings, as soon as the court become satisfied that there is sufficient evidence to put the person charged on his trial, they may, if they deem it expedient to deal with the case summarily, call on the person to plead, after having first had the charge reduced into writing, and having explained the effect of pleading. If he plead guilty, they shall cause a plea of guilty to be entered, and adjudge the prisoner to be imprisoned, with or without hard labour, for any term not exceeding six months. If he plead not guilty the prisoner is committed for trial (c).

In no case, however, can an adult charged with any of the above offences be dealt with summarily when, owing to a previous conviction *on indictment*, the offence is punishable with penal servitude (d).

4. *Common Assaults and Batteries.*

Common assaults.

When any person unlawfully assaults or beats another, two magistrates, upon complaint of the party aggrieved, may hear and determine such offence, and may inflict a fine to the extent of £5 (and in default of payment, one month's imprisonment), or may sentence to imprisonment not exceeding two months with or without hard labour. If the person assaulted, &c., is a male child under the age of fourteen, or a female of any age, the offender may be fined to the extent of £20, or imprisoned for a term not exceeding six months. He may also be bound over to

Aggravated assaults.

(a) 42 & 43 Vict. c. 49, s. 12.
(c) 42 & 43 Vict. c. 49, s. 13.

(b) v. p. 491.
(d) *Ibid.* s. 14.

keep the peace for a further period of six months (a). The words of the enactment when referring to a common assault are "upon complaint by or on behalf of the party aggrieved." Unless, therefore, the party aggrieved, or some one on his behalf (and an unauthorised police officer is not such a person), complains of the assault, a court of summary jurisdiction has no power to convict of a common assault (b). But this is not the case with regard to an aggravated assault upon a woman or child, as the complaint may then be by any one.

When a husband has been convicted of an aggravated assault upon his wife, the court has power to make an order having the effect of a judicial separation; and may also order the husband to pay a weekly sum, not exceeding two pounds, for the wife's support, and give the custody of children under sixteen years of age to the wife (c).

If the magistrate, after hearing upon the merits any of the above cases of assault or battery, deem the offence not proved, or find the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, they make out and deliver to the party charged a certificate stating the fact of such dismissal (d). This certificate, or the conviction (if the punishment has been suffered), is a bar to any other proceedings, civil or criminal, for the same cause (e). The certificate is, however, only to be given in cases where the complaint has been made by the person assaulted.

But if the magistrates find that the assault or battery was accompanied by an attempt to commit a felony, or think, from any other circumstance, that it is a fit subject for prosecution by indictment, they abstain from adjudication, and send the case for trial. They may not determine any case of assault and battery in

(a) 24 & 25 Vict. c. 100, ss. 42, 43.

(b) *Nicholson v. Booth*, 57 L. J. (M.C.) 43; 58 L. T. 187; 52 J. P. 662.

(c) 58 & 59 Vict. c. 39. As to these orders v. p. 178.

(d) 24 & 25 Vict. c. 100, s. 44.

(e) *Ibid.* s. 45.

which a question arises as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of a court of justice (a).

5. *Larcenies not indictable.*

Non-indictable
larcenies.

We have already, under the headings of Offences by Children, Offences by Young Persons, and Offences by Adults, dealt with the case of larcenies which are the subject of indictment, but which, in the circumstances above mentioned, can be dealt with summarily. It now remains to treat of such unlawful takings of property as are punishable on summary conviction, but which do not amount to larceny in the strict sense of the term, and cannot be made the subject of an indictment for that offence.

The taking of personal property, trees, animals, &c.—Almost every possible injury in the nature of an illegal taking of personal property or of things annexed to the realty, when not indictable, is punishable before one or more justices under the Larceny Act, 1861 (b).

Subsequent
offences.

In some cases after one summary conviction, in other cases after two summary convictions for the offence, such offence amounts to a felony, and is indictable as larceny (c). The punishment for receiving stolen property when the original offence is punishable on summary conviction is the same as for the original offence (d).

6. *Small wilful Injuries to Property.*

Every possible injury to property, when not indictable, is punishable on summary conviction under the Malicious

(a) 24 & 25 Vict. c. 100, s. 44.

(b) *Ibid.* c. 96; dogs, ss. 18, 19; deer, ss. 12, 14, 15; rabbits, s. 17; beasts or birds ordinarily kept in confinement, but not subjects of larceny. pigeons, fish, &c., ss. 21-24; trees, fences, vegetable productions, &c., ss. 33-37.

(c) See 24 & 25 Vict. c. 96, ss. 9, 12, 18, 19, 20, 21, 33, 34, 36, 37.

(d) *Ibid.* s. 97.

Injuries to Property Act, 1861 (*a*). Thus, it is provided that any person committing damage to any property, in any case not previously provided for, may, on conviction before a justice of the peace, be imprisoned for a term not exceeding two months or fined to the extent of £5 and also ordered to make compensation not exceeding £5. In default of payment of these sums the offender may be imprisoned for a term not exceeding one month (*b*). Particular sections also deal with certain cases of injury, which are thus excluded from the operation of the general clause (*c*). In some cases a second or third offence amounts to a felony or misdemeanor (*d*).

7. *Offences relating to Game.*

Among a number of offences relating to game, punishable on summary conviction, the following may be noticed:—

To obtain game by unlawfully going on any land in search for game or rabbits, or to use guns, &c., for taking game, or to act as an accessory, is punishable by penalty to the extent of £5; the game and instruments being forfeited (*e*).

By night unlawfully to take or destroy game or rabbits, or enter with guns, &c., for the purpose of taking or destroying game, is punishable for the first offence by imprisonment to the extent of three months, for the second to the extent of six months (*f*).

PROCEEDINGS UPON SUMMARY CONVICTIONS.

The law upon this subject was consolidated in one of Summary proceedings.

(*a*) 24 & 25 Vict. c. 97.

(*b*) *Ibid.* s. 52. If the injury exceeds in amount £5, the offence is, by s. 51, a misdemeanor.

(*c*) Trees, vegetable productions, &c., ss. 22–24; fences, walls, gates, s. 25; telegraphs, ss. 37, 38; animals not cattle, s. 41.

(*d*) *Ibid.* ss. 22, 23.

(*e*) 25 & 26 Vict. c. 114, s. 2.

(*f*) 9 Geo. 4, c. 69, s. 1. See also chapter on game, p. 138; 1 & 2 Wm. 4, c. 32; 7 & 8 Vict. c. 29.

Jervis's Acts (*a*). It should be premised that the Act does not extend to convictions under the Factory Acts, nor to a few other matters specially mentioned (*b*).

The information.

The following is an outline of the proceedings:—An *information* is laid before a justice of the peace that a person has committed, or is suspected to have committed, an offence for which he is liable on summary conviction to be imprisoned, fined, or otherwise punished. This information gives the justice jurisdiction, and limits his inquiry to the matter contained therein. It must be laid (unless a particular period is fixed by the statute on which it is founded) within six months from the time when the matter arose (*c*). It must be laid before a magistrate by the informant in person, or by his counsel or attorney, or other person authorised in that behalf (*d*). It need not be in writing, unless it is so directed to be by the statute dealing with the offence, though it usually is in writing, and 11 & 12 Vict. c. 43 seems to assume this (*e*). Nor, as a rule, need it be on oath, unless a warrant to apprehend the person charged is issued in the first instance instead of a summons, in which case the matter of the information must be substantiated by the oath or affirmation of the informant, or of some witness on his behalf before the warrant is issued (*f*).

The summons.

The next step is the issue of the *summons*, directed to the accused, stating shortly the matter of the information, and requiring him to appear at a certain time and place to answer the information, and to be dealt with according to law. And here it may be observed that if a justice of the peace refuse to do any act relating to the

(*a*) 11 & 12 Vict. c. 43. The other two are chapters 42 and 44 of the same year; the former dealing with the performance of the duties of justices out of sessions with respect to persons charged with indictable offences (v. p. 316); the latter is an Act to protect justices from vexatious actions for acts done by them in the execution of their office.

(*b*) 11 & 12 Vict. c. 43, s. 35.

(*c*) *Ibid.* s. 11.

(*d*) *Ibid.* s. 10. v. Paley, Sum. Conv. 73.

(*e*) Paley, Sum. Conv. 78. Oke's Mag. Syn. 45.

(*f*) 11 & 12 Vict. c. 43, s. 10; see also s. 2. For forms, v. Oke's Mag. Formulist, pp. 1-3; see also Oke's Mag. Syn. pp. 42 *et seq.*

duties of his office as such justice, *e.g.*, refusing to issue a summons, the party requiring such act to be done may apply to the Queen's Bench Division of the High Court, upon an affidavit of the facts, for a rule calling upon such justice, and also the party to be affected by such act to show cause why such act should not be done, and, if after due service of such rule, good cause be not shown against it, the Queen's Bench Division may make the same absolute, with or without costs, as it thinks proper; and the justice upon being served with such rule absolute must obey it and do the act required, and no proceedings are to be taken against a justice for obeying such rule and doing the act required (*a*). But if a magistrate has *bona fide* exercised his discretion and brought his mind to bear upon the question whether he ought to act or not, the High Court has no jurisdiction to review his decision (*b*); unless he has taken into consideration matters which are outside the ambit of his jurisdiction and absolutely apart from the matters which by law ought to be taken into consideration (*c*).

The summons is served by the proper officer on the party charged personally, or at his last or usual abode (*d*). If the person so served does not appear at the time and place specified, provided a reasonable time has intervened between the summons and the day appointed, the justice or justices may, upon the matter of the information being to their satisfaction substantiated by oath or affirmation, issue a *warrant* to apprehend the accused. Authority is given to them to issue a warrant in the first instance instead of issuing a summons, if they think fit, on the information being to their satisfaction substantiated by

Issue of a
warrant.

(*a*) 11 & 12 Vict. c. 44, s. 5. This provision is really intended for the protection of the magistrate in cases where he might otherwise incur personal liability by taking the course desired. But in all cases where a justice, whether from a mistaken view of his power or otherwise, declines to perform his duty or to proceed in a matter where he has jurisdiction, the High Court has an inherent jurisdiction to compel him by mandamus to do his duty.

(*b*) *Ex parte Lewis*, L. R. 21 Q. B. D. 191; 57 L. J. (M.C.) 108.

(*c*) *R. v. Cotham*, L. R. [1898] 1 Q. B. at p. 806; 67 L. J. (Q.B.) 632.

(*d*) 11 & 12 Vict. c. 43, s. 1.

oath or affirmation (a). This warrant must state shortly the matter of the information, must be under the hand and seal of the justices issuing it, and be directed to the constable in whose hands it remains in force until executed. It may be executed by apprehending the accused at any place within the jurisdiction of the issuing justice, or out of such jurisdiction on being indorsed or backed by a magistrate of the jurisdiction in which the defendant is (b).

Hearing in the absence of the accused.

A second course may be pursued if the summons, having been duly served, is not obeyed. The justices may proceed *ex parte* to the hearing of the information, and may adjudicate thereon, as fully and effectually as if the party had personally appeared in obedience to the summons. But this does not dispense with the necessity for the due examination of the facts upon oath (c).

Attendance of witnesses, how secured.

To secure the attendance of witnesses for the prosecution and for the accused they may be served with a summons, and, if this is disobeyed, they may be arrested on a warrant. Or, if the justice is satisfied on oath or affirmation that the witness will not attend to give evidence unless compelled, a warrant to secure such attendance may be issued in the first instance. If the witness attends but refuses to be sworn, or, without just excuse, to answer questions, he may be committed to prison for seven days (d).

The hearing

The *hearing* takes place before one or more justices, the number being determined by the particular Act making the offence subject to the summary proceedings, or, if there is no direction on this point, before one justice of the jurisdiction where the matter has arisen.

The case.

No case arising under any statute can be heard, tried, determined, or adjudged by a court of summary jurisdiction except when sitting in open court (e). "Open court"

(a) 11 & 12 Vict. c. 43, s. 2.

(c) *Ibid.* s. 2.

d) *Ibid.* s. 7.

(b) *Ibid.* s. 3.

(e) 42 & 43 Vict. c. 49, s. 20.

means either a petty sessional court-house, that is, a place where special or petty sessions are usually held, or an occasional court-house, that is, a police station or other place appointed by the petty sessions as a place to be used for an occasional court-house.

Two or more justices sitting in a petty sessional court-house, or the Lord Mayor, or any of the Aldermen of the City of London, or any police or stipendiary magistrate, sitting in a court-house, where he has the usual power of two justices, constitute "a petty sessional court." Petty sessional court.

No fine of more than twenty shillings, and no imprisonment of more than fourteen days, can be given by a court of summary jurisdiction other than a petty sessional court. Indictable offences can be dealt with summarily under the Summary Jurisdiction Act, 1879, only by a petty sessional court sitting on a day publicly appointed for hearing indictable offences. Other cases, under that or any future Act, triable by a court of summary jurisdiction, shall, unless otherwise provided, be tried only by a court of two or more justices or a petty sessional court. A case may be adjourned by a court of summary jurisdiction to the next practicable sitting of a petty sessional court (*a*).

The accused may make full defence, give evidence himself, and call witnesses, and either party may be represented by counsel or attorney (*b*). A policeman is not allowed to be an advocate in the proceedings of which he has charge (*c*). The hearing.

If the defendant fails to appear, the justices may proceed to hear and determine (a course, however, seldom taken), or may adjourn. If the defendant appears and the prosecutor does not, the magistrates will generally dismiss the complaint or they may adjourn the hearing (*d*). Failure of one party to appear.

(*a*) 42 & 43 Vict. c. 49, s. 20; 52 & 53 Vict. c. 63, s. 13 (11-13).

(*b*) 11 & 12 Vict. c. 43, s. 12.

(*c*) *Webb v. Catchlowe*, 50 J. P. 795.

(*d*) 11 & 12 Vict. c. 43, s. 13.

Adjournment. In the case of any adjournment the magistrates have power to commit the defendant for the interval, or suffer him to go at large, or discharge him on his entering into recognizances with or without sureties. If he gives security but fails to reappear, the magistrates may transmit the recognizances to the clerk of the peace, to be proceeded upon in like manner as other recognizances (*a*).

Proceedings at the hearing. If both the parties appear, the following are the proceedings. The substance of the information is read to the defendant, and he is asked if he has any cause to show why he should not be convicted. If he admits the truth of the information, and does not show any cause why he should not be convicted, the justices proceed to convict and pass judgment. If he does not admit the truth of the charge, the magistrates hear the prosecutor, and such witnesses as he may examine (every examination being on oath or affirmation (*b*)), and afterwards the defendant (who may now in every case give evidence on oath) (*c*) and his witnesses. The prosecutor will then be allowed to call evidence in reply, if the defendant has examined any witnesses or given any evidence other than to his general character; but the prosecutor is not entitled to make any observations in reply upon the evidence given by the defendant, nor the defendant to make any observations in reply upon the evidence given by the prosecutor in reply (*d*). The magistrates then consider the whole matter, and determine the same by convicting the defendant or dismissing the information. If there are more magistrates than one, the result is determined by the opinion of the majority; if they are equally divided, and come to no decision, there may be a fresh information or adjournment to next sitting (*e*). If they convict, they make a memorandum thereof, and the conviction being drawn up in proper form is lodged with the clerk

The decision.

(*a*) 11 & 12 Vict. c. 43, s. 16.

(*b*) *Ibid.* s. 15.

(*c*) 61 & 62 Vict. c. 36, s. 1, v. p. 394.

(*d*) 11 & 12 Vict. c. 43, s. 14.

(*e*) See *Kinnis v. Graves*, 67 L. J. (Q.B.) 583; 78 L. T. 502; 46 W. R. 480.

of the peace, to be filed among the records of the general quarter sessions. If the information is dismissed, the magistrates must, if required, give a certificate of the order of dismissal to the defendant, and this will be a bar to a subsequent information or complaint for the same matter against the same person (a).

The *judgment* consists of two parts, namely, the ad- The judgment. judication of conviction, and the sentence or award of punishment. This punishment may be either fine or imprisonment, or both, according to the direction of the statute under which the offence falls, which statute also defines the limits of the punishment. Sometimes satisfaction by the wrongdoer to the person injured may be ordered without the infliction of any other punishment (b). Again, the information may be dismissed without the infliction of any punishment, if it is inexpedient to inflict punishment (c), or the offence is too trifling (d). And, as we have seen, the court may, even after conviction, discharge certain first offenders on their entering into recognizances to appear for judgment if called upon (e).

The mode of enforcing payment of pecuniary fines is Payment of fines. by distress and sale of the goods and chattels of the person convicted. For this purpose the justice issues a warrant of distress, which is executed by the constable. But if it appears to the court of summary jurisdiction, to Distress or imprisonment. whom application is made to issue a distress warrant, that the defendant has no goods whereon to levy the distress, or that in the event of a warrant being issued his goods will be insufficient to satisfy the money payable by him, or that the levy of the distress will be more injurious to him or his family than imprisonment, the defendant may be committed to prison at once for any period not exceeding the period for which he is liable to

(a) 11 & 12 Vict. c. 43, s. 14.

(b) 24 & 25 Vict. c. 96, s. 108 ; c. 97, s. 66.

(c) 18 & 19 Vict. c. 126, s. 1 ; 26 & 27 Vict. c. 103, s. 1.

(d) 24 & 25 Vict. c. 100, s. 44.

(e) 50 & 51 Vict. c. 25, *ante*, p. 452.

be imprisoned in default of payment (*a*). And in default of sufficiency of distress, unless the statute on which the conviction is founded provides some other remedy, he may be committed. But when by part payment, or by the proceeds of a distress, the sum payable has been reduced so that the balance, if it had been the original sum payable, would have rendered the defendant liable in default only to a smaller period of imprisonment than the term to which he is liable under the conviction, the court shall on application reduce the term of imprisonment accordingly (*b*).

Wearing apparel and bedding of a person and his family cannot be taken under a distress, nor can the tools and implements of his trade to the value of £5. And the court has power to postpone the issue of a distress warrant for such time and on such conditions as it shall deem expedient (*c*).

When the statute under which a penalty is adjudged provides for imprisonment in default of payment, and makes no provision for raising the amount by distress, but directs that if it be not paid within a certain time the defendant shall be imprisoned, then the amount is not to be raised by distress, but the defendant in default is to be committed to prison (*d*).

Costs.

As to *costs*.—On conviction, the magistrate may order the defendant to pay the prosecutor's costs. On dismissal, the magistrate may order the prosecutor to pay to the defendant such costs as seem reasonable. The amount is to be specified in the conviction or order of dismissal, and recovered as penalties are (*e*), but imprisonment cannot, in default of distress, be inflicted for non-payment of costs by an unsuccessful prose-

(*a*) 11 & 12 Vict. c. 43, s. 19; 42 & 43 Vict. c. 49, s. 21.

(*b*) 11 & 12 Vict. c. 43, ss. 21, 22; 42 & 43 Vict. c. 49, s. 21, sub-a. 4; v. also 61 & 62 Vict. c. 41, s. 9.

(*c*) 42 & 43 Vict. c. 49, s. 21, sub-ss. 1, 2.

(*d*) 11 & 12 Vict. c. 43, s. 23; v. s. 19.

(*e*) *Ibid.* ss. 18, 26; see also s. 24.

cutor without proof that he has or has had means to pay (a).

When a fine is imposed not exceeding five shillings, no costs are payable by the defendant to the informant without an express order; and the fine, or part thereof, may be ordered to be paid to the informant towards his costs; and all fees payable or paid by the informant shall be remitted, or returned, unless otherwise expressly ordered (b).

The Summary Jurisdiction Act, 1879, also provides for the payment by the county treasurer of the costs of proceedings for indictable offences which are dealt with summarily, in the same way as the costs of trials at the sessions or assizes (c).

As to *appeal* from the decision of the magistrate.— Appeal.
Two kinds of appeal must be distinguished: (i) the ordinary appeal to the quarter sessions: (ii) the appeal to a superior court on a case stated by the justices out of sessions.

i. The ordinary appeal from a conviction by the magistrate is to the quarter sessions. But it is not a matter of common right; it must be given by express enactment (d), and is confined to cases referred to in such enactment. Two of the Criminal Consolidation Acts (the Larceny and Malicious Injuries Acts) confer a right to appeal when, on summary conviction for offences against those Acts, the sum adjudged to be paid exceeds £5, or the imprisonment adjudged exceeds one month, or where the conviction has taken place before one justice only (e).

(a) 42 & 43 Vict. c. 49, ss. 35, 47; *R. v. Lord Mayor of London, ex parte Boulter*, L. R. [1893], 2 Q. B. 146; 63 L. J. (M.C.) 29; 42 W. R. 159; 57 J. P. 633.

(b) 42 & 43 Vict. c. 49, s. 8.

(c) *Ibid.* s. 28.

(d) Paley, Sum. Con. 282.

(e) 24 & 25 Vict. c. 96, s. 110; c. 97, s. 68. A reference to the tables in Oke's Magisterial Synopsis will show in what cases there is an appeal.

Appeal under
Summary
Jurisdiction
Act, 1879.

And by the Summary Jurisdiction Act, 1879, the right of appeal is extended to all cases where a person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or for failing to do or abstain from doing any act or thing required to be done or left undone; except in the following cases:—Where the person has pleaded guilty, or admitted the truth of the information or complaint; where the imprisonment is adjudged for failing to comply with an order for payment of money, for the finding of sureties, for the entering into any recognizance, or for the giving of any security (*a*). If a person charged before a court of summary jurisdiction with an indictable offence under sect. 12 of the Act elects to be dealt with summarily and is convicted he has no right of appeal to quarter sessions (*b*). In the metropolis also there is an appeal in every case where a fine of more than £3 is inflicted, except in revenue cases (*c*).

In some cases execution is not stayed by the appeal; but it generally is.

Conditions of
appeal.

Under the Summary Jurisdiction Act, 1879, by which the proceedings upon all appeals are now regulated (*d*), such appeals are subject to the following conditions and regulations:—

a. The appeal shall be to the *next* practicable court of general or quarter sessions having jurisdiction in the county, borough, or place for which the court of summary jurisdiction acted; and holden not less than *fifteen* days after the day on which the decision was given upon which the conviction or order was founded.

b. The appellant must give notice in writing of his

(a) 42 & 43 Vict. c. 49, s. 19.

(b) *R. v. Justices of London, ex parte Lambert*, L. R. [1892], 1 Q. B. 664; 61 L. J. (M.C.) 104; 66 L. T. 678; 40 W. R. 575; 56 J. P. 421.

(c) 2 & 3 Vict. c. 71, s. 50.

(d) 47 & 48 Vict. c. 43, s. 6.

intention to appeal, within seven days after the decision, to the other party (a) and to the clerk of the court of summary jurisdiction, and the notice must state the general grounds of the appeal.

c. The appellant must, within three days after his notice of appeal (b) enter into recognizances before a court of summary jurisdiction (c), with such sureties as that court may direct, to prosecute the appeal, and abide the result and pay such costs as may be awarded. Instead of finding sureties money may be deposited with the clerk of the court as security.

d. If the appellant is in custody, he may be released if the court think fit, on entering into recognizances or giving security.

e. Notices to be given in writing by the appellant must be signed by him or his agent on his behalf, and may be sent by registered letter, and they will be deemed to have been served at the time when they would have been delivered in the ordinary course of post (d).

Large discretionary powers are given to the court of appeal in relation to costs, adjournments, and modifying, confirming, or reversing the decisions of the court of summary jurisdiction.

Fresh evidence may be given on the hearing of the appeal. The respondent begins, and supports the order of the court below; if he does not attend the conviction should be quashed (e). The decisions of the quarter

(a) Notice to the solicitor is insufficient, *R. v. Justices of Oxfordshire*, L. R. [1893], 2 Q. B. 149.

(b) The appeal cannot be heard if the recognizance is entered into *before* the notice of appeal is given. *R. v. Justices of Cheshire*, 60 J. P. 585.

(c) Not necessarily before the justices whose order is appealed from, or even before justices for the same county, *R. v. Justices of Durham*, L. R. [1895], 1 Q. B. 801; 64 L. J. (M.C.) 187; 72 L. T. 465; 43 W. R. 423; 59 J. P. 264.

(d) 42 & 43 Vict. c. 49, s. 31.

(e) *R. v. Justices of Surrey*, L. R. [1892] 2 Q. B. 719; 61 L. J. (M.C.) 200; 67 L. T. 266; 41 W. R. 79; 56 J. P. 742.

sessions are by a majority of votes, and are pronounced by the chairman. Such decision is conclusive, unless a case is reserved for the consideration of the Queen's Bench Division.

Case for
opinion of
superior court.

Instead of the appeal of which notice has been given being heard by the quarter sessions, the parties may, by consent and by order of any judge of the superior court, state the facts of the case in the form of a special case for the opinion of the superior court, and agree to abide by its judgment, which will have the same effect as if given by the quarter sessions on appeal (*a*). This proceeding must not be confounded with another form of appeal by a case stated to which we are now about to refer.

Resort to a
superior court.

ii. Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is *erroneous in point of law, or is in excess of jurisdiction*, may apply to the court to state a special case setting forth the facts of the case, and the grounds on which the proceeding is questioned. And if the court decline to state the case, he may apply to the High Court of Justice for an order requiring the case to be stated (*b*). This resort to a superior court operates as an abandonment of the right to appeal to the quarter sessions (*c*). Certain conditions have also to be complied with, and a recognizance must be entered into to prosecute the appeal, and to pay the costs of the respondent, if the court allows them. The application must be made as may be directed from time to time, by rules (*d*). By one of these rules an application to a court of summary jurisdiction, under sect. 33 of the Summary Jurisdiction Act, 1879 (*e*), to

(*a*) 12 & 13 Vict. c. 45, s. 11.

(*b*) 42 & 43 Vict. c. 49, s. 33; 20 & 21 Vict. c. 43, s. 2.

(*c*) 20 & 21 Vict. c. 43, s. 14.

(*d*) The Summary Jurisdiction Rules, 1886.

(*e*) 42 & 43 Vict. c. 49.

state a special case must be in writing and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding questioned, and the case shall be stated within three calendar months after the date of the application and after the recognizance has been entered into (*a*).

Where no notice of application for the case in writing had been given to the justices making the order, though notice of application in writing had been served on their clerk, it was held that there was no power to state a case (*b*).

When the case has been stated by the justices, the appellant gives notice of the appeal to the other party, and supplies him with a copy of the case (*c*), transmitting the original to the Queen's Bench Division of the High Court, whose decision upon it is final, unless that court gives special leave to appeal to the Court of Appeal (*d*).

When there is any fault or illegality in the commitment alone, the proper remedy is for the defendant to sue out a writ of *habeas corpus*, which will be directed to the gaoler in whose custody the defendant is. Irregular
commitment

The proceedings may also be removed by writ of *Certiorari* from the justices to the Queen's Bench Division for the purpose of being examined by that court, and, if necessary, quashed. Unlike the qualified right of appeal, this right exists in every case as a matter of common law, unless expressly taken away by statute. As no writ of error lies on summary convictions, this is the only mode

(*a*) Rule 18 of the Summary Jurisdiction Rules, 1886.

(*b*) *Lockhart v. The Mayor of St. Albans*, L. R. 21 Q. B. D. 188; 57 L. J. (Q. B. D.) 118; v. also *Westmore v. Paine*, L. R. [1891] 1 Q. B. 482; 60 L. J. (M.C.) 89; 64 L. T. 55; 39 W. R. 463; 55 J. P. 440.

(*c*) Service upon the solicitor of the other party is insufficient. *Hill v. Wright*, 60 J. P. 312.

(*d*) 36 & 37 Vict. c. 66 (Jud. Act. 1873), s. 45.

in which a revision of these proceedings by the superior court can be obtained (*a*).

A writ of *certiorari* will in general lie for (1) a defect or informality on the face of the proceedings before the magistrates; (2) where there has been a want of jurisdiction on their part, or any of the magistrates have had an interest in the subject-matter of the proceedings or the proper jurisdiction of the magistrates has been exceeded; and (3) where a conviction has been obtained fraudulently. The issuing of the writ is, except when it is applied for by the Attorney-General, in the discretion of the court, and the application must be made within six months from the date of the proceedings complained of. Six days' notice of the intended application must be given to the justices. They do not, however, usually show cause in the first instance, but wait until a rule *nisi* is made, and then if they, or the other party interested, wish to oppose, cause is shown against the rule being made absolute (*b*).

Proceedings
against magis-
trates.

It will not be necessary to do more than mention that certain proceedings (in some cases civil, in some criminal) may be taken against justices for any irregularity or excess in their measures. As to criminal steps, it may be stated generally that, "wherever the powers vested in justices for the summary execution of penal laws are exerted from corrupt or personal motives," the delinquent may be proceeded against by criminal information, and punished accordingly; but "an information is never granted for an irregularity arising merely from ignorance or mistake" (*c*).

Summary
jurisdiction
depends
entirely on
statute.

In conclusion, we may again draw attention to the fact that the examination and punishment of offences in a summary manner by justices of the peace, without the

(*a*) Paley, Sum. Con. 423.

(*b*) For fuller details as to the practice, see Crown Office Rules, 1886, and Short and Mellor's Crown Office Practice, p. 114.

(*c*) Paley, Sum. Con. 506, 507.

intervention of a jury, is founded entirely upon a special authority conferred and regulated by statute in the case of each offence. No new offence is cognizable in this manner unless expressly made so by statute; if some statute does not authorise the summary proceeding, the offence must be dealt with in the ordinary way by indictment or information (*a*).

(*a*) Paley, Sum. Con. 15.

APPENDIX.

61 & 62 VICT. c. 36.

(An Act to amend the Law of Evidence.)

[12th August, 1898.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

Competency of witnesses in criminal cases.

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application :

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution :

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged :

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage :

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged :

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or

(iii.) he has given evidence against any other person charged with the same offence.

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses gave their evidence :

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the Right of reply. question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4.—(1) The wife or husband of a person charged with an Calling of wife or husband in certain cases. offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. In Scotland, in a case where a list of witnesses is required, Application of Act to Scotland. the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure 50 & 51 Vict. c. 35. (Scotland) Act, 1887.

6.—(1) This Act shall apply to all criminal proceedings, Provision as to previous Acts. notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the 40 & 41 Vict. c. 41. Evidence Act, 1877.

(2) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline 29 & 30 Vict. c. 109. Act, by general orders made in pursuance of section sixty-five of that Act; and

(b) as to courts martial under the Army Act by 44 & 45 Vict. c. 58. rules made in pursuance of section seventy of that Act.

7.—(1) This Act shall not extend to Ireland.

(2) This Act shall come into operation on the expiration Extent, commencement, and short title. of two months from the passing thereof.

(3) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.

ENACTMENTS REFERRED TO.

SESSION AND CHAPTER.	SHORT TITLE.	ENACTMENTS REFERRED TO.
5 Geo. 4, c. 83 .	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83 .	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100.	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75 .	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69 .	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41 .	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

TABLE OF OFFENCES.

THEIR PUNISHMENTS, STATUTES, &c.

Unlawful societies	Misd.	7 yrs.	2 yrs.	No.	57 Geo. 3, c. 19	40
Offences against Foreign Enlistment Act	Misd.	...	{ F. or im. not ex. 2 yrs. or both.	Yes.	33 & 34 Vict. c. 90	49
Desertion, Mutiny, &c.	Fel.	Life.	3 yrs.	No.	37 Geo. 3, c. 70	51
Illegal training and drilling	Misd.	7 yrs.	2 yrs.	No.	60 Geo. 3 & 1 Geo. 4, c. 1	52
Public stores, applying marks appropriated for	Misd.	...	2 yrs.	Yes.	38 & 39 Vict. c. 25	52
Public stores, obliterating marks	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i>	
Military Offences by soldiers and sailors, v. p. 53						
<i>Coinage Offences.</i>						
Counterfeiting gold or silver of realm	Fel.	Life.	2 yrs.	...	24 & 25 Vict. c. 99	54
" copper of realm or foreign gold or silver	Fel.	7 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 2	
" foreign copper	Misd.	...	1 yr.	Yes.	<i>Ibid.</i> ss. 14, 18	
" (second offence)	Misd.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 22	54
Colouring, &c., to represent gold or silver	Fel.	Life.	2 yrs.	Yes.	<i>Ibid.</i> s. 23	55
Impairing, &c., gold or silver	Fel.	14 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 3	
Having clippings, &c.	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 4	
Defacing coin	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 5	
Buying or selling counterfeit gold or silver copper	Fel.	Life.	1 yr.	Yes.	<i>Ibid.</i> s. 16	
" " copper	Fel.	7 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 6	
Importing, &c., counterfeit gold or silver	Fel.	Life.	2 yrs.	Yes.	<i>Ibid.</i> s. 14	
" foreign gold or silver	Fel.	7 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 7	
Exporting counterfeit coin	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 19	56
Uttering- counterfeit gold or silver or copper	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 8	
if other counterfeit in possession, or other uttering within 10 days	Misd.	...	1 yr.	Yes.	<i>Ibid.</i> ss. 9, 15	
after certain previous convictions	Fel.	Life.	2 yrs.	Yes.	<i>Ibid.</i> s. 10	
counterfeit foreign coin	Misd.	...	6 months.	No.	<i>Ibid.</i> s. 12	57
second offence	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 20	
third offence	Fel.	Life.	2 yrs.	Yes.	<i>Ibid.</i> s. 21	
spurious coin resembling coin of realm	Misd.	...	1 yr.	No.	<i>Ibid.</i> s. 21	
				Yes.	<i>Ibid.</i> s. 13	

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against Government & Sovereign—cont.						
Having in possession— three or more pieces of counterfeit g. ors.	Misd.	3 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 99, s. 11	57
" " after certain previous convictions	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 12	
" " of counterfeit copper	Misd.	...	1 yr.	Yes.	<i>Ibid.</i> s. 15	
more than five pieces of counterfeit foreign coin		(Summary conviction.)			<i>Ibid.</i> s. 23	
Making, &c., coining tools	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 24	58
Making &c., coining tools for copper	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 14	
Conveying out of Mint, tools, bullion, &c.	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 25	
Concealment of treasure trove	Misd.	...	F. or imp. or both.	Yes.	...	59
Disclosure of official secrets	Misd.	...	1 yr. imp. or fine.	No.	52 & 53 Vict. c. 52	59
" if to a foreign State	Fel.	Life.	2 yrs.	No.		
Offences against Religion :						
Apostacy (second offence)	Misd.	...	3 yrs.	No.	9 & 10 Wm. 3, c. 32	61
Blasphemy	Misd.	...	F. and imp.	No.	...	62, 184
Disturbing public worship	Misd.	...	F. of £40	Yes.	52 Geo. 3, c. 155, s. 12.	
Riotous conduct in public worship		(Summary conviction.)			23 & 24 Vict. c. 32	63
Swearing and profanation of Sabbath		(Summary conviction)			19 Geo. 2, c. 21	63
Palmistry, &c., v. Vagrancy.					29 Car. 2, c. 7	
Offences against Public Justice :						
Escape	Fel. or Misd.	...	(v. p. 66.)	Yes.	16 Geo. 2, c. 31	65
" aiding	Fel.	...	2 yrs.	Yes.	28 & 29 Vict. c. 126, s. 37	66
" aiding while prisoner being conveyed	Fel.	7 yrs.	...			

Offences against Public Justice—continued.						
Breach of prison : if for felony	Fel.	7 yrs.	2 yrs.	Yes.	1 Edw. 2, st. 2, c. 1	66
" " otherwise	Misd.	...	F. and imp.	Yes.	...	67
Being at large during a term of penal servitude.	Fel.	{ Life, (Prev.im. 4 yrs.) }	2 yrs.	No.	5 Geo. 4, c. 84, s. 22	67
Rescue, if person rescued convicted of felony	Fel.	7 yrs.	3 yrs.	Yes.	1 & 2 Geo. 4, c. 88	68
Rescue if not so convicted, or of misdemeanor	Misd.	...	F. or im., or both	Yes.	...	
Rescue in case of murder	Fel.	Life.	3 yrs.	No.	25 Geo. 2, c. 37, s. 9	
Poundbreach	Misd.	...	F. or im., or both (v. p. 69.)	Yes.	...	
Obstructing arrest						
Perjury and subornation	Misd.	7 yrs.	{ F. or im. not ex. 7 yrs. }	No.	{ 2 Geo. 2, c. 25, s. 2 23 Geo. 2, c. 11 14 & 15 Vict. c. 100, ss. 19-22 20 & 21 Vict. c. 3 5 & 6 Wm. 4, c. 62, s. 13 }	70 74
Voluntary oaths	Misd.	...	F. or im. or both	No.		74
False declarations, v. p. 74						
Bribery, of those in office	Misd.	v. also p. 90	F. and im.	No.	49 Geo. 3, c. 126	75, 82
Sale, &c., of offices	Misd.	...	F. and im.	Yes.	...	76
Bribery and other corrupt practices at elections	Misd.	...	{ F. of £200 or im. 1 yr. }	No.	{ 17 & 18 Vict. c. 102 21 & 22 Vict. c. 87 26 & 27 Vict. c. 29 30 & 31 Vict. c. 102, s. 49 31 & 32 Vict. c. 125, ss. 43-47 35 & 36 Vict. c. 60, s. 3 46 & 47 Vict. c. 51, s. 6 }	77
Personation	Fel.	...	2 yrs.	No.	{ 35 & 36 Vict. c. 53, s. 24 46 & 47 Vict. c. 51, s. 6 }	78
Illegal practice	Misd.	...	F. £100.	No.(a)	{ 46 & 47 Vict. c. 51, ss. 7, 10 }	79

(a) The offences of unlawfully withdrawing an election petition, of an elector employed by a candidate voting, and of a returning officer his clerk or partner acting as agent for a candidate are triable at Quarter Sessions.

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &C.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against Public Justice—continued.						
Embracery	Misd.	...	F. or im., or both	Yes.	6 Geo. 4, c. 50, s. 61 .	82
Common Barratry	Misd.	...	F. or im., or both	Yes.	12 Geo. 1, c. 29, s. 4 .	83
Maintenance	Misd.	...	F. or im., or both	Yes.	8 Eliz., c. 2 .	84
Champerty	Misd.	...	F. or im., or both	Yes.	...	85
Compounding felony	Misd.	...	F. and im.	Yes.	...	86
Taking reward to help to stolen property	Fel.	7 yrs.	2 yrs.	Yes.	{ 24 & 25 Vict. c. 96, ss. } { 101, 102 . }	86
Compounding misdemeanor without proper leave	Misd.	...	F. and im.	Yes.	...	87
Compounding informations on penal statutes without leave	Misd.	...	F. and im.	Yes.	{ 18 Eliz. c. 5 . } { 56 Geo. 3, c. 138, s. 2 . }	87
Misprision of felony	Misd.	...	F. or im., or both	Yes.	...	88
Criminal dealings with records, v. p. 88						
Extortion, and other misconduct of officers of justice	Misd.	...	F. or im., or both	Yes.	...	89
Contempt of court of justice . . . . .	...	...	F. or im., or both	Yes.	...	90
Offences against the Public Peace:						
Riot, rout, or unlawful assembly	Misd.	...	F. or im., or both	Yes.(a)	{ v. 24 & 25 Vict. c. 97. } { ss. 11, 12 . }	91, 92
" under Riot Act, after proclamation						
Affray	Fel.	Life.	3 yrs.	No.	1 Geo. 1, st. 2, c. 5 .	93
Challenge to fight	Misd.	...	F. or im., or both	Yes.	...	94
Challenge to fight	Misd.	...	F. or im., or both	Yes.	...	94
Sending letter threatening to kill, &c.	Fel.	10 yrs.	2 yrs.	Yes.	{ 24 & 25 Vict. c. 97, s. } { 50; c. 100, s. 16 . }	95
Extorting by threats	Fel.	{ Life (5) yrs. if threat not by }	2 yrs.	{ No. (unless threat be) }	24 & 25 Vict. c. 96, ss. 44, 45 .	95

Extorting by letter accusing of crime	Pen.	Life.	2 yrs. { K. or im., or both (Length of im. v. p. 103 3 yrs.	No.	100, 40, 41	90
Libel, defamatory	Misd.	...	{ K. or im., or both (Length of im. v. p. 103 3 yrs.	No.	{ 32 Geo. 3, c. 60 . 6 & 7 Vict. c. 96, ss. 3-10 51 & 52 Vict. c. 64 .	97
" to extort money	Misd.	...	3 yrs.	No.	6 & 7 Vict. c. 96, s. 8.	104
" v. seditious libel, blasphemy, <i>supra</i> .	Misd.	...	F. or im., or both	Yes.	21 Jac. 1, c. 15 .	104
Forcible entry or detainer	Misd.	...				
Offences against Trade:						
Smuggling—taking goods from warehouse without paying duty	Misd.	...	F. or im.	Yes.	39 & 40 Vict. c. 36, s. 85	106
" shooting at vessels, wound- ing officers, &c.	Fel.	Life.	3 yrs.	No.	<i>Ibid.</i> s. 193 .	
" procuring persons to as- semble for	Misd.	...	1 yr.	Yes.	<i>Ibid.</i> s. 189 .	
" if persons armed or disguised making signals, &c.	Misd.	...	{ 3 yrs. £100 or 1 yr. 2 yrs. In some cases In others 1 yr.	Yes.	<i>Ibid.</i> s. 190 .	
Bankrupt Laws, offences against	{ Misd. Fel. s. 12 }	...		Yes.	{ 32 & 33 Vict. c. 62 . 46 & 47 Vict. c. 52, s. 163 }	107
Counterfeiting trade-marks	Misd.	...	{ F. or im., not ex. 2 yrs., or both.	{ Yes. (except making false de- claration under Act.)	50 & 51 Vict. c. 28 .	109
Unlawful interference with trade	{ Misd. or Sum Con. }	...	3 months or £20	Yes.	{ 24 & 25 Vict. c. 100, ss. 39, 40 . 34 & 35 Vict. c. 31, s. 2 38 & 39 Vict. c. 86 .	111
Conspiracy:						
in ordinary cases	Misd.	...	F. or im., or both	Yes. (b)	14 & 15 Vict. c. 100, s. 12	115
to murder	Misd.	10 yrs.	2 yrs.	No.	24 & 25 Vict. c. 100, s. 4	116

(a) Except the riotous demolition of houses, machinery, &c., which must be tried at the Assizes, the punishment extending to penal servitude for life—v. p. 271.

(b) Except conspiracies to commit crimes which there is no jurisdiction to try at Quarter Sessions.

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against Public Morals, Health, &c.:						
Bigamy	Fel.	7 yrs.	2 yrs.	No.	24 & 25 Vict. c. 100, s. 57	119
Indecent conduct, or publication . .	Misd.	...	F. or im., or both	Yes.	{ 14 & 15 Vict. c. 100, ss. 25-29	121
Gaming, cheating at	Misd.	3 yrs.	2 yrs.	Yes.	{ 20 & 21 Vict. c. 83	122
" in highways and public places	...	(v. Vagrancy.)			{ 8 & 9 Vict. c. 109, s. 17	123
Gaming-house, keeping	Misd.	...	F. or im., or both	Yes.	{ 36 & 37 Vict. c. 38, s. 3	123
Sending circulars, &c., to infants, soliciting to bet or lorrow	Misd.	...	£100 or 3 moa.	Yes. (c)	{ v. p. 123	123
Nuisance, common or public	Misd.	...	F. or im., or both	Yes.	{ 55 Vict. c. 4	125
Adulteration of provisions (2nd offence)	Misd.	...	6 months.	Yes.	{ 38 & 39 Vict. c. 63	126
Furious driving	Misd.	...	2 yrs. or f., or both	Yes.	{ 24 & 25 Vict. c. 100, s. 35	130
Vagrancy, idle and disorderly persons	...	...	1 month	Summary conviction.	{ 5 Geo. 4, c. 83	132
" rogues and vagabonds . . . . .	...	...	3 months	Yes.	{ 1 & 2 Vict. c. 38	133
" incorrigible rogues . . . . .	...	(Summary conviction.)	1 yr.	Yes.	{	134
Drunkenness, v. p. 135	Misd.	...	F. or im., or both	Yes.	{ 57 & 58 Vict. c. 60, ss. 419, 422, 457	135
Unseaworthy ship, sending to sea . .	Misd.	...	F. or im., or both	Yes.	{	136
Neglect of duty by master, &c., of ship.	Misd.	...	F. or im., or both	Yes.	{	136
Offences relating to Game: v. p. 483						
Taking, &c., by night after two summary convictions	Misd.	7 yrs.	2 yrs.	Yes.	{ 9 Geo. 4, c. 69	138
Assaulting officers, when committing, &c. Three or more armed entering, &c. .	Misd.	7 yrs.	2 yrs.	Yes.	{ 7 & 8 Vict. c. 29	139
Taking hares or rabbits by night in warren	Misd.	14 yrs.	2 yrs.	No.	{ 25 & 26 Vict. c. 114	139
Taking deer (v. p. 197), 2nd offence or in enclosure	Misd.	...	F. or im., or both	Yes.	{ 24 & 25 Vict. c. 96, s. 17	140
Spring guns, &c., setting	Fel.	...	2 yrs.	Yes.	{ Ibid, ss. 12, 13	140
Day poaching	Misd.	5 yrs.	3 yrs.	Yes.	{ 24 & 25 Vict. c. 100, s. 31	141
		(Summary conviction.)			{	142

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &C.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Assaults, &c.—continued.						
Assault with intent to commit felony . . .	Misd.	...	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 38	182
Attempt to choke, &c., with intent, &c. . .	Fel.	Life.	2 yrs. (Whipping.)	No.	<i>Ibid.</i> s. 21 . . .	
Administering chloroform, &c., with intent, &c. . .	Fel.	Life.	2 yrs.	No.	26 & 27 Vict. c. 44 . .	
Administering poison, so as to endanger, &c. . .	Fel.	10 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 22	
Administering poison, with intent to annoy, &c. . .	Misd.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> ss. 23, 25 . . .	183
By explosion, &c., to do grievous bodily harm . . .	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 28 . . .	
Explosion with intent to do grievous bodily harm . . .	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 29 . . .	
Placing gunpowder, &c., near buildings, ships, &c., with intent . . .	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 30 . . .	
Endangering safety of railway passengers by certain acts . . .	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> ss. 32, 33 . . .	184
" " " otherwise	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 34 . . .	
Assault on officer, &c., preserving wreck	Misd.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 37 . . .	
Impeding escape from wreck . . .	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 17 . . .	
Forcing or leaving seamen on shore . . .	{ Misd. } or Sum. Conv.	...	F. or im., or both	Yes.	{ 57 & 58 Vict. c. 60, ss. 184, 187, 188, 680 . . }	184
Assault on peace officer, &c. . .	Misd.	...	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 38	185
" clergyman on duty . . .	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 36 . . .	185
" gamekeeper . . .	Misd.	7 yrs.	2 yrs.	Yes.	9 Geo. 4, c. 69, s. 2 . .	
" apprentices and servants . . .	Misd.	3 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 10, s. 26	
" lunatic . . .	{ Misd. } or Sum. Conv.	...	K. or im., or both	Yes.	24 Vict. c. 16, s. 1	186

(Conv.)		Misd.	...	F. or im., or both	Yes.		189
"	with intent to rob, v. <i>infra</i> .						
"	indecent, v. <i>supra</i> .						
"	in violation of trade, v. <i>supra</i> .						
False imprisonment							
Larceny:							
Simple larceny (as to small larcenies, v. p. 479)		Fel.	3 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 96, s. 4 {	190
Simple larceny after previous conviction for felony		Fel.	10 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 7 . . .	212
Simple larceny, after previous conviction for indictable misdemeanor under Larceny Act		Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 8 . . .	453
Simple larceny, after two summary convictions		Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 9 . . .	453
Larceny by bailees		Fel.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 3 . . .	203
" by husband or wife of the other's goods					Yes.	{ 45 & 46 Vict. c. 75, ss. 12, 16 . . .	206
" by tenants or lodgers, of fixtures, &c.		Fel.	{ 7 yrs. if value above £5 }	2 yrs.	Yes.	24 & 25 Vict. c. 96, s. 74	212
" by clerks or servants		Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 67 . . .	212
" by public officers		Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 69 . . .	214
Stealing, &c., materials of buildings or fixtures		Fel.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 31 . . .	192
Stealing, &c., from mines		Fel.	...	2 yrs.	Yes.	<i>Ibid.</i> ss. 38, 39 . .	
" trees, &c., in garden, &c., to value of £1, or elsewhere to value of £5		Fel.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 32 . . .	
" trees, &c., to value of £1 after two summary convictions		Fel.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 33 . . .	193
" plants, &c., in garden, &c., after summary conviction		Fel.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 36 . . .	
" deeds, &c.		Fel.	3 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 28 . . .	

TABLE OF OFFENCES.—THIR PUNISHMENTS, STATUTES, &C.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Larceny—continued.						
Stealing, &c., bonds, bills, notes, and other valuable securities . . .	Fel.		(v. p. 194.)	Yes.	24 & 25 Vict. c. 96, s. 27	194
" wills . . .	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 29 . . .	195
" records . . .	Fel.	3 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 30 . . .	195
" water, gas or electricity . . .	Fel.	3 yrs.	2 yrs.	Yes.	45 & 46 Vict. c. 56, s. 23	196
" animals . . .			(v. p. 196.)	Yes.		
" deer in enclosed place, or after previous conviction in uninclosed . . .	Fel.	...	2 yrs.	Yes.	{ 24 & 25 Vict. c. 96, ss. 12, 13 . . . }	197
" hares, &c., in warren at night . . .	Misd.	...	F. or im., or both	Yes.	<i>Ibid.</i> s. 17 . . .	197
" fish in certain waters . . .	Misd.	...	F. or im., or both	Yes.	<i>Ibid.</i> s. 24 . . .	197
" oysters from fishery . . .	Fel.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 26 . . .	198
" dogs, after previous summary conviction . . .	Misd.	...	18 months.	Yes.	<i>Ibid.</i> s. 18 . . .	198
" horse, cow, sheep, &c. . .					{ <i>Ibid.</i> ss. 19, 20 . . . }	198
					<i>Ibid.</i> s. 10 . . .	198
					<i>Ibid.</i> s. 11 . . .	199
" certain goods in process of manufacture . . .	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 62 . . .	213
" from vessels, docks, &c. . .	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 63 . . .	
" from wrecks, &c. . .	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 64 . . .	
Robbery . . .	Fel.	14 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 40 . . .	
" with violence . . .	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 43 . . .	
" by person armed . . .	Fel.	Life.	2 yrs.	No.	{ <i>Ibid.</i> s. 27 Viol. c. 44 . . . }	216
" by two or more . . .	Fel.	Life.	2 yrs.	No.		

			(v. p. 217.)		Yes.	7 Wm. 4 & 1 Vict. c. 36 24 & 25 Vict. c. 96, s. 91 <i>Ibid.</i> s. 95	218 220 222 222
Post Office larceny, &c.	Receiving stolen goods, where principal offence a felony, &c.	Fel.	14 yrs.	2 yrs.			
" where a misdemeanour	" where punishable on summary conviction	Misd.	7 yrs.	2 yrs.	Yes.		
Extortion by threats, &c., v. <i>supra</i> .			Summary conviction.				
Embezzlement:							
Embezzlement	(As to small embezzlements, v. p. 479.)	Fel.	14 yrs.	2 yrs.	Yes.(a)	{ 24 & 25 Vict. c. 96, ss. 68-72	226
Embezzlement by bankers, factors, attorneys, &c.	" by trustees	Misd.	7 yrs.	2 yrs.	No.	{ 24 & 25 Vict. c. 96, ss. 75-87	230
" by directors, &c., of public companies	" by directors, &c., of public companies	Misd.	7 yrs.	2 yrs.	No.		232
Falsification of accounts		Misd.	7 yrs.	2 yrs.	Yes.	38 & 39 Vict. c. 24	233
False Pretences, &c.:							
Obtaining by false pretences	Attempting to obtain by same	Misd.	3 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 96, ss. 88, 89	236
Inducing by fraud, execution, &c., of valuable securities		Misd.	...	F. or im.	Yes.	...	241
False personation to obtain property of seamen	" of soldiers	Fel.	3 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 96, s. 90	243
" of owners of stock	" bail	Misd.	Life.	2 yrs.	No.	37 & 38 Vict. c. 36	243
Cheating		Misd.	5 yrs.	2 yrs.	Yes.	28 & 29 Vict. c. 124, ss. 8, 9	244
		Fel.	Life.	2 yrs.	No.	2 & 3 Wm. 4, c. 53, s. 49	244
		Fel.	7 yrs.	2 yrs.	No.	24 & 25 Vict. c. 98, s. 3	244
		Misd.	...	F. or im., or both	Yes.	<i>Ibid.</i> s. 34	244
					Yes.	...	245
Burglary, &c.:							
Burglary		Fel.	Life.	2 yrs.	Yes.(b)	{ 24 & 25 Vict. c. 96, ss. 51-53	247

(a) Except in the case of a clerk or servant of the Bank of England, or Bank of Ireland, who may be sentenced to penal servitude for life, 24 & 25 Vict. c. 96, s. 73.
(b) But see p. 299.

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Burglary, &c.—continued.						
Entering house at night with intent, &c.	Fel.	7 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 96, s. 54	251
Being found at night armed, with intent, &c.						
" " disguised or with house-breaking instrument, &c.	Misd.	3 yrs.	2 yrs.	Yes.	<i>Ibid.</i> ss. 58, 59	252
" " in building with intent, &c.		(After prev. conv., v. p. 252.)				
Housebreaking	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> ss. 55, 56	252
" if intended felony not committed	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 57	253
Sacrilege	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 50	
" if intended felony not committed	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 57	
Larceny in dwelling-house to amount of £5.	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 60	253
" " to any amount, if bodily fear, &c.	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 61	
Forgery:						
According to the nature of the instrument forged	Fel.	(v. pp. 257-259).		No.	24 & 25 Vict. c. 98	256
At common law (i.e., of instruments not provided for by statute)	Misd.	...	F. or im., or both	No.	...	260
As to Exchange Bills, Bonds, &c.						
Making, &c., plates, implements, &c.	Fel.	7 yrs.	2 yrs.	No.	24 & 25 Vict. c. 98, s. 9	263
" " paper, &c.	Fel.	7 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 10	264
Purchasing, &c., paper or plates	Misd.	...	2 yrs.	No.	<i>Ibid.</i> s. 11	264
As to Bank Notes.						
Certain offences as to paper, plates, &c.	Vol.	14 yrs.	2 yrs.	No.	<i>Ibid.</i> ss. 13, 19	264
By forged instrument demanding, &c.	Fel.	14 yrs.	2 yrs.	No.	<i>Ibid.</i> s. 38	265

Injuries to Property: <i>Arson</i> , in cases of certain specified buildings " other buildings Setting fire to things in, &c., buildings, &c. Attempt to set fire to buildings, &c. Setting fire to crops, trees, &c. " stacks of corn, &c. Attempt to set fire to crops, &c., stacks. Setting fire to mines of coal, &c. Attempt " " Setting fire to, or casting away ships Attempt " " Setting fire to ships of war, or military stores " " vessels in docks of London	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 97, ss. 1-5	266
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 6	267
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 7	267
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 8	267
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 16	268
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 17	
	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 18	
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 26	
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 27	268
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> ss. 42, 43	
Malicious injury to— Houses, by explosion, so as to endanger, &c., life Houses, throwing gunpowder, &c., on with intent, &c. " by demolishing, &c. " by damaging, &c. " tenant demolishing, &c. Manufactures, certain goods in process of, or the machinery Machines of other kinds Mines and their engines, &c. Vessels, by explosion " otherwise " altering signals, or otherwise endangering " interfering with buoys " wrecked, &c. Sea and river banks, quays and wharves, &c. Cutting piles, opening sluices, &c.	Fel.	Life.	2 yrs.	No.	12 Geo. 3, c. 24, s. 1	269
	Fel.	Death.	...	No.	39 Geo. 3, c. 69, s. 104	271
	Fel.	Life.	2 yrs.	No.	{ 24 & 25 Vict. c. 97, s. 9; 46 & 47 Vict. c. 3, ss. 2-4 }	
	Fel.	14 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 10	
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 11	
	Misd.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 12	271
	Misd.	...	F. or im., or both	Yes.	<i>Ibid.</i> s. 13	272
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 14	272
	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 15	
	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> ss. 28, 29	
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 45	
Sea and river banks, quays and wharves, &c. Cutting piles, opening sluices, &c.	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 46	273
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 47	
	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 48	
	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 49	
	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 30	274
	Fel.	7 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 31	

TABLE OF OFFENCES.—THEIR PUNISHMENTS, STATUTES, &c.—continued.

OFFENCE.	FELONY OR MISDEMEANOR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Injuries to Property—continued.						
Bridges, viaducts, and aqueducts, &c.	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 97, s. 33	274
Turnpikes, &c.	Misd.	... (Summary conviction.)	F. or Im., or both	Yes.	<i>Ibid.</i> s. 34	
Walls, gates, &c.	Fel.	Life.	2 yrs.	No.	<i>Ibid.</i> s. 25	
Railways, with intent to upset, &c.	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 35	274
" obstructing by unlawful act or neglect	(Misd. or Sum. Conv.)	...	2 yrs.	Yes.	<i>Ibid.</i> s. 36	
Telegraphs	Fel.	5 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 37	275
Electric line or work	Misd.	7 yrs.	2 yrs.	Yes.	45 & 46 Vict. c. 56, s. 22	275
Ponds, fish, &c.	Fel.	14 yrs.	2 yrs.	Yes.	{ 24 & 25 Vict. c. 97, s. 32 } { 36 & 37 Vict. c. 71, s. 13 }	275
Animals, kill, maim, &c., cattle	Fel.	(Summary conviction.)	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 40	276
" " others		(Summary conviction.)			{ 12 & 13 Vict. c. 92, ss. } { 2, 18 }	276
" ill-treat, torture, &c.	Fel.	3 yrs.	2 yrs.	Yes.	{ 24 & 25 Vict. c. 97, ss. } { 20, 21 }	276
Trees, &c., in parks, to value of £1; elsewhere to value of £5	Misd.	3 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 22	277
" to value of 1s. (third offence)	Fel.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 24	
Plants, &c., in garden, &c. (second offence)		3 yrs.	2 yrs.	Yes.		
Malicious injury to—						
Hopbines	Fel.	14 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 19	277
Works of art, &c.	Misd.	...	6 months.	Yes.	<i>Ibid.</i> s. 39	
Other injuries exceeding £5	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 51	
" " at night	Misd.	5 yrs.	2 yrs.	Yes.	<i>Ibid.</i> s. 51	278
" " below that amount		(Summary conviction)			<i>Ibid.</i> s. 52	482
Making, or having in possession dangerous thing or instrument, with intent to commit a felony under the Act	Misd.	...	2 yrs.	Yes.	<i>Ibid.</i> s. 54	278

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